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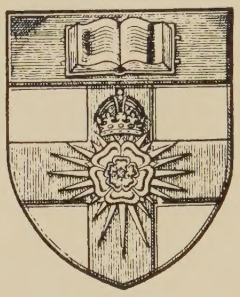

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1867

THE

LAW REPORTS.

English and Irish Appeal Cases

AND

Claims of Peerage

BEFORE

THE HOUSE OF LORDS.

REPORTED BY CHARLES CLARK, BARRISTER-AT-LAW,
BY APPOINTMENT OF THE HOUSE OF LORDS.

VOL. I.

DURING THE SESSION OF 1866.—XXIX & XXX VICTORIÆ.

LONDON:
PRINTED FOR THE COUNCIL OF LAW REPORTING
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14 CHARING CROSS.
PUBLISHING OFFICE, 51 CAREY STREET, LINCOLN'S INN, W.C.

1866.

ERRATUM.

Page 63.—1st line 2nd paragraph of Head-note *for* "finding," *read* "findings."

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Appeal Cases

BEFORE

THE HOUSE OF LORDS.

ENGLISH AND IRISH APPEALS.

THE GREAT WESTERN RAILWAY COMPANY, AND OTHERS . . . . } APPELLANTS.

THE ATTORNEY-GENERAL . . . . RESPONDENT.

1866
Feb. 27.

SC 12 Jur NS. 417

Railway Passenger Traffic Duty—Cheap Trains—Remission of Duty—Board of Trade.

By the 2nd section of the 5 & 6 Vict. c. 79, a duty is imposed on sums of money received by railway companies in respect of passenger traffic; and by section 4, an account of such sums is to be kept by the persons "so receiving or charging the same," who are to pay the duty thereon:—

Held, that the persons who actually receive the money, without regard to the question for whose ultimate benefit such money is received, are the persons to keep the accounts and to pay the duties.

Where, therefore, the *Great Western Railway Company* had made a "loop-line," over which the *Midland Railway Company* had, by Act of Parliament running powers, and such powers were exercised by the *Midland Company* through its servants, engines, and carriages, independently of all control by the *Great Western Company*, but the fares received at the stations on the loop-line for passengers carried by the *Midland Company*, were in fact received by the clerks of the *Great Western Company*, though they were so received for the benefit of the *Midland Company*:—

Held, that the *Great Western Company* was bound, as actually receiving the fares, to keep the accounts, and to pay the duty.

The 7 & 8 Vict. c. 85, requires cheap trains to be run on every line, under certain conditions, performance of the first being expressly subjected to approval by the Board of Trade. There were other conditions, one of which

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GREAT WESTERN RAILWAY CO. v. ATTORNEY-GENERAL.

was that the cheap-train fares should not exceed one penny per mile. The Board had power to dispense with any of the conditions except this one. The 9th section declared that "no tax shall be levied on the receipts from the conveyance of passengers at fares not exceeding one penny for each mile" —Trains were run at those fares; but these trains had not received the approval of the Board of Trade:—

Held, that the duty was payable on these cheap trains.

IN this case the *Attorney-General* had filed an information against the Appellants (who represented the now amalgamated interests of the *Great Western* and of the *Oxford, Worcester, and Wolverhampton Railway Companies*), to compel them to render accounts of passengers carried over a loop-line of the *Oxford, Worcester, and Wolverhampton Company*, under an agreement made with the *Birmingham and Gloucester Railway Company* (now amalgamated with the *Midland Railway Company*), and to require the Appellants to pay the duty imposed by the 5 & 6 Vict. c. 79, ss. 2 and 4, on money received in respect of passenger traffic.

The *Birmingham and Gloucester Railway Company* had formed a line which at a place called *Abbot's Wood* went in a northerly direction towards *Birmingham*, leaving *Worcester, Fearnall Heath*, and *Droitwich* to the left or westward. The *Oxford, Worcester, and Wolverhampton Railway Company* made a line which passed through all these places, crossing the *Birmingham and Gloucester* line at *Abbot's Wood*, and the *Birmingham and Gloucester Company*, which had itself been refused permission to make this portion of the line, had obtained from Parliament the introduction of a clause into the *Oxford, Worcester, and Wolverhampton Railway Company's* Act, giving to the *Birmingham and Gloucester Company* the right to use this part of the line. The part over which these running powers extended went from *Abbot's Wood* through *Worcester, Fearnall Heath*, and *Droitwich*, all of which were on the *Oxford and Wolverhampton* line, and then turned north-easterly to *Stoke Prior*, where it came upon the original *Birmingham and Gloucester* line. The *Midland Railway Company*, after the making of this line, called for distinction's sake the "Loop-line," entered into an agreement with the *Oxford, Worcester, and Wolverhampton Company*, dated the 1st of October, 1855, for the use of the Loop-line, and had ever since used it exclusively for passenger traffic.

The terms of the agreement, as set forth in the answer to the information, were these:—"That in respect of traffic *from* or *to* the *Midland Railway* system *to* or *from* stations on the Loop-line the *Midland Railway Company* pay to the *Oxford, Worcester, and Wolverhampton Railway Company* £50 per cent. of the gross receipts; and in respect of traffic passing *from* the *Midland Railway* system *through* the Loop-line, the *Midland Railway Company* pay to the *Oxford, Worcester, and Wolverhampton Railway Company* £1200 a-year as way-leave," which last payment the answer alleged, was subject to be discontinued at any moment. This arrangement was not in writing. The *Midland Railway Company* employed its own engines and carriages in conveying passengers on the Loop-line; the moneys in respect of passenger fares so earned were collected by the clerks of the Appellants, who, however, insisted that their clerks and servants, in thus collecting and receiving the moneys for the *Midland Railway*, acted only as agents for that company.

By the 5 & 6 Vict. c. 79, s. 2, a duty at the rate of 5 per cent. was made payable in respect of passenger fares on railways, and by section 4 accounts were directed to be rendered (1). The 5th section authorized (when there was no express agreement to the contrary) any such proprietor or company "to deduct from and

(1) Section 4: "That the proprietor, or company of proprietors of any railway, and every other person who shall carry, convey, or cause to be carried or conveyed, any passenger for hire in or upon any railway in *Great Britain*, shall from time to time, and at all times enter in a book, &c., as the Commissioners of Stamps shall direct, an account of all sums, &c., received by or for such proprietor or company or other person, for the fare of all such passengers, whether the same shall be received on the railway of such proprietor or company or other person, or on such last-mentioned railway and any other railway, or on any such other railway only, and for or in respect of all which sums of money the duties charged by this Act shall in manner hereinafter directed be paid by the said proprietor or company or other person so receiving or charging the same as aforesaid; and the proprietor or company so receiving or charging any such sums, &c., shall also keep an account of all sums paid or accounted for by such proprietor or company to the proprietor or company of any other railway upon which such passengers shall be carried as his or their share so received or charged as aforesaid, or as, or for, or in the nature of toll or otherwise, for the use of such last-mentioned railway in the conveyance of such passengers." And a copy of these accounts was to be delivered to the proper revenue officer, and the duty paid to the Receiver-General by the persons receiving the fares.

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retain out of the moneys to be paid over to any such other proprietor or company the amount of the duties, &c., which such proprietor or company receiving such moneys shall have paid or be liable to pay."

By the 7 & 8 Vict. c. 85, it was directed (section 6) "that all companies shall, by means of one train at the least, to travel along their railway from one end to the other of each trunk, branch, or junction line belonging or leased by them, so long as they shall continue to carry other passengers over such trunk, &c., once at the least each way on every week day, provide for the conveyance of third-class passengers to and from the terminal and other ordinary passenger stations of the railway, under the obligations of their several Acts of Parliament, and with the immunities applicable by law to the carriers of passengers by railway, and also under the following conditions." The first of these conditions related to the hour of starting, which was expressly directed to be subject to the approval of the Board of Trade; the second to the rate of speed; the third was, "Such train shall, if required, take up and set down passengers at every passenger station which it shall pass on the line." The fourth related to seats in the carriages; the fifth declared that "the fare for each third-class passenger shall not exceed one penny for each mile travelled." The sixth and seventh conditions related to luggage, and children under six years of age. The 7th section subjected all companies which did not comply with these provisions as to cheap trains to a penalty of £20 a day. The 8th section provided that, "Except as to the amount of fare for each passenger by such cheap trains," the Board of Trade was to have a discretionary power of dispensing with any of the conditions thereinbefore required, and a railway company conforming to the other conditions sanctioned by the Board was not to be subjected to any penalty for not observing any condition so dispensed with. The 9th section enacted, "That no tax shall be levied upon the receipts of any railway company from the conveyance of passengers at fares not exceeding one penny for each mile by any such cheap train as aforesaid."

The information alleged that the provisions of this Act with regard to the remission of duty in respect of money received for

the conveyance of passengers by cheap traffic trains were not applicable to the case of passengers conveyed by one company on a railway belonging to another; that, consequently, the Board of Trade, so soon as it became aware of the terms of the arrangement between the two companies, had withdrawn its approval of the *Midland Railway Company's* cheap traffic trains so far as they ran over the Loop-line; that the *Midland Company* paid the duty on so much of the money as was received by that company itself at its own stations in respect of these cheap traffic trains, but declined to pay the duty on that portion of the money derived from such trains on the Loop-line as was received at the stations on that Loop-line itself, alleging that such duty was properly payable by the Appellants; and it was alleged that the Appellants rendered accounts, and paid the duty in respect of first and second class passengers, but not of cheap-train passengers on this Loop-line. These allegations were met by the declaration that the Appellants allowed to the *Midland Company* the use of the Loop-line in conformity with the running powers granted by the Appellants' Act, and did not receive the moneys on their own account, that their clerks, &c., only acted as agents for the *Midland Company*, and that they had rendered the accounts and paid the duties in respect of first and second class passengers from station to station on the Loop-line under a mistaken opinion as to their liability, but now they denied their liability.

The Court of Exchequer (Mr. Baron *Martin* dissentiente), on the 27th of February, 1862, made a decree declaring the liability of the Appellants to render the accounts required, and to pay the duty thereon (1). This appeal was then brought.

Mr. *Coleridge*, and Mr. *Bere*, for the Appellants:—

The Appellants were bound under the clause for granting running powers to allow the *Midland Company* the use of the line for passenger traffic, and its uninterrupted use was by the agreement between the two companies fully secured. The *Midland Company* ran its own trains with its own engines, carriages, and servants along the line, and all that the Appellants did was to permit their clerks to act as the agents of the *Midland Company*

(1) 7 H. & N. 840, 8 Jur. N.S. 214

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in collecting the money paid by the passengers. The duty is to be paid by those who "carry and convey" the passengers. Those words which really override the whole section cannot apply to the Appellants, whose carriages and engines do not carry and convey the passengers, but who are only the owners of the line along which they are carried and conveyed, who have no control over the times of travelling, the speed, or the charges. All that the Appellants do is to allow their servants to collect the money and the tickets. They may perhaps be called, in one sense of that phrase, receivers of the money, but they are receivers only in the shape of agents, and the statute never intended to make such receivers liable to pay the duty. The Act contemplates only accounts and payments from such as receive as carriers. In no sense can the Appellants be described as carriers of these *Midland* passengers, while the carrying of them along the Loop-line is, by force of an Act of Parliament, under the absolute control of the *Midland Company*. The lessees of the line alone are, under such circumstances, the persons who receive the fares, and ought to render the accounts, and pay the duty. Try the question by a test of legal liability. If there was an action in respect of an overcharge, it must be brought against the *Midland Company*. The mere fact that the money at the station was received by the hands of clerks in the service of the Appellants would not render the Appellants liable.

Secondly. These trains were cheap trains within the meaning of the exemption in the statute, and are not liable to duty. The line, though not, in the technical sense of the word, the property of the *Midland Company*, belonged to it for the purpose of use; and if the company had not run a cheap train once a day, it would have had to pay a penalty under the 7 & 8 Vict. c. 85. For all the purposes of passenger traffic the Loop-line was, and had been for years, part of the *Birmingham and Gloucester* line, and the obligation of the *Midland Company* to run a cheap train on it was absolute. The approval of the Board of Trade did not affect this liability; nor did it apply to the exemption from duty. That exemption arose in respect of the cheapness of the fare, and of nothing else. Although in other respects the Board of Trade might interfere with the company, the obligation to run a cheap

train was absolute, for the Act says expressly that the company "shall" run a cheap train, and it only gives the Board the power to express its approval of some of the incidental matters connected with running it. Those matters are not mentioned in the 9th section as at all affecting the exemption from duty to be enjoyed by the company in respect of fares received from passengers carried in the cheap train. The exemption depends alone on the amount of the fares.

The *Attorney-General* (Sir *R. Palmer*), the *Solicitor-General* (Sir *R. P. Collier*), and Mr. *Pemberton*, appeared for the Respondent, but were not called on.

THE LORD CHANCELLOR :—

My Lords, I think we need not trouble the *Attorney-General* to address the House in this case, for it seems to me to be a perfectly clear one.

By the Act of Parliament the 5 & 6 Vict. c. 79, a duty is imposed upon passenger traffic, and that duty is to be ascertained and accounted for in the following manner :—Certain accounts are to be kept. The company over whose line the trains are run, or the company running the trains, is to keep an account of all money that it has received. That is all that is important to the present question. There are two other accounts to be kept, but they are for collateral objects. It is sufficient to say that the company is bound to keep an account of all moneys received for passengers.

It is enacted by the 4th section of the Act. [His Lordship read it; see *ante*.] It seems to me to be utterly unimportant for whom the persons actually receiving the money do in fact receive it. It may be that they have to account for the whole of it—that is quite immaterial. Theirs are the hands that receive it, it is received in respect of passenger traffic, and is therefore to be accounted for and the duty paid to her Majesty.

That, indeed, was not the point mainly relied upon by the Appellants, but what was relied upon was, that although by the statute of the 5 & 6 Vict. this duty is imposed, the subsequent statute of the 7 & 8 Vict. c. 85, made an exemption in respect of

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the money that was received from passengers travelling by this particular train. That exemption depends upon this fact. The Legislature, in order to provide for the poorer class of travellers, enacted that on and after the several days thereinafter specified, all passenger railway companies shall [His Lordship here read the 6th sec.; see *ante.*] One of the conditions imposed by the Act is, that "such train shall start at an hour to be from time to time fixed by the Directors, subject to the approval of the Lords of the Committee of Privy Council for Trade and Plantations." Another is, that "Such train shall, if required, take up or set down passengers at every passenger station which it shall pass on the line."

Now, my Lords, without going in detail into the reasons which have been very clearly stated as bearing on the case, it is plain that the *Midland Railway Company* in running trains from *Birmingham* into *Gloucester* had not, by the terms of the agreement between the two companies, the power of stopping at every station on the portion of the line which is situate between *Abbot's Wood* and *Stoke Prior*, and therefore could not comply with the latter condition. Whether that is a technical objection or not I do not know, but it is perfectly obvious that they cannot bring themselves within this particular condition, and the Board of Trade has refused to give them its sanction.

It appears to me, therefore, on these very short grounds (and the grounds appear to be very clearly stated, as far as I have been able to gather from a cursory inspection of the judgment given by the Lord Chief Baron), that the case was rightly decided, and that this appeal is entirely unfounded. I shall, therefore, move your Lordships that this appeal be dismissed with costs.

LORD CHELMSFORD:—My Lords, the two points are perfectly clear, and I entirely agree with what has fallen from my noble and learned friend on the woolsack.

LORD KINGSDOWN:—I am of the same opinion.

Decree affirmed, and appeal dismissed with costs.

Lords' Journals, Feb. 27.

THOMAS GEORGE WILLIAMS . . . . . APPELLANT ;

AND

ROBERT PALMER HARDING . . . . . RESPONDENT.

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Feb. 19, 20, 22;
March 11.

Calls—Debt—Joint-stock company—Winding-up Acts—Bankruptcy—Petitioning creditor—11 & 12 *Vict. c.* 45; 12 & 13 *Vict. c.* 108; 24 & 25 *Vict. c* 134.

The 90th section of the *Bankrupt Act* (24 & 25 Vict. c. 134), 1861, is to be construed as a remedial enactment.

Under that section, therefore, no debt incurred by a non-trader is sufficient to found an adjudication of bankruptcy against him, unless it was contracted by him after the period at which the contracting of debts by a non-trader made him liable to the bankrupt laws, namely, after the passing of the *Bankruptcy Act*, 1861.

Liability to the debts of a joint-stock company incurred in 1849, by a person then becoming a shareholder of the company and signing the deed of settlement which expressly created that liability, made him a debtor at the moment the debts were contracted by the company; and calls made on him in 1862 and 1863 (under the authority of a winding-up order) to pay money in respect of those debts, did not themselves constitute a "debt contracted after the passing of the Act 1861," but amounted merely to an enforcement of the liability incurred when he became a shareholder.

Under the 11 & 12 Vict. c. 45 and the 12 & 13 Vict. c. 108, the official manager to whom calls are ordered to be paid, does not, in virtue of such order, become a creditor of the person who has to pay the calls, so as to be entitled to be a petitioning creditor, and to ask for an adjudication in bankruptcy against him.

IN the year 1847, the *Professional Life Assurance Company* was formed, and was duly registered under the 7 & 8 Vict. c. 110. By the deed of settlement the capital was to be £250,000, divided into 20,000 shares of £12 10*s.* each, payable by instalments. There was a stipulation in the deed, "That every proprietor, as between him and all or any of the other proprietors, should be answerable in respect of the calls, debts, and losses of the company, in the proportion of his share and interest for the time being in the property of the company, but not farther or otherwise." A debt due by a proprietor to the company might be sued for as if due from a person not a proprietor.

In February, 1849, the Appellant became possessed of 500

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shares in the company, executed the deed of settlement, and was thereon registered as a proprietor or shareholder. On the 11th of May, 1861, an order was made by the Master of the Rolls to wind up the company, under the provisions of *Winding-up Acts*, 1848-1849, and the Respondent was appointed official manager for that purpose. On the 28th of November, 1861, the Appellant was put on the list of contributories, in respect of his 500 shares. On the 10th of May, 1862, a call of £1 10*s.* per share was made. On the 4th of June, 1863, another call of £3 15*s.* per share was made. The sum payable to the company by the Appellant was declared to be £1921 13*s.* 8*d.*, and was, by an order of the Master of the Rolls, made at Chambers on the 23rd of July 1863, directed to be paid to *Harding* the official manager. The money was not paid, and on the 4th of November, 1863, the Respondent, as official manager, filed his Petition in the Court of Bankruptcy, for an adjudication in bankruptcy against the Appellant, not being a trader, alleging that the Appellant had resided abroad for more than six months next preceding the date of the Petition, and was indebted to the Petitioner, as official manager, in the sum of £1921 13*s.* 8*d.* On the 1st of February, 1864, Mr. Commissioner *Goulburn* declined to make an adjudication against the Appellant, being of opinion that the alleged petitioning creditor's debt was not, within the meaning of the 90th section of the *Bankruptcy Act* of 1861, "contracted after the passing of that Act" (1), and ordered the Petition to be dismissed.

Harding, as petitioning creditor, appealed against this decision to the Lord Chancellor (Lord *Westbury*), sitting in bankruptcy. On the 16th of March, 1864, his Lordship directed that the order of Mr. Commissioner *Goulburn* should be discharged, and the case being thus remitted back to the Commissioner, the Appellant was, on the 21st of March, adjudged a bankrupt, which adjudication was, upon formal hearing, confirmed. The case was again taken before

(1) 24 & 25 Vict. c. 134, s. 90. "The debt of [due to] the petitioning creditor of [from] any debtor, not being a trader, and not being at the time a prisoner against whom such creditor would have been entitled to obtain a vesting order in insolvency if this Act had not passed, must be a debt contracted after the passing of this Act, and the judgment-debtor summons must be a summons in respect of a debt contracted, or of a liability incurred after the passing of this Act."

(1) Reported 10 Jur. N.S. 412.

the Lord Chancellor, sitting in bankruptcy, and argued, when the order of the Commissioner was confirmed (1), but subject to a case, the Lord Chancellor granting a certificate in the following terms: "The matter of law or equity brought before me by *R. P. Harding* and *T. G. Williams* respectively, being of sufficient difficulty and importance to require the decision of your Lordships' House."

Mr. *J. Napier Higgins*, and Mr. *Swanston*, for the Appellant:—

There are two questions here, first, whether the sum of £1921 13*s.* 8*d.* ordered on the 23rd of July, 1863, to be paid by the Appellant to the Respondent, is a "debt contracted after the passing of the *Bankruptcy Act* of 1861;" and, secondly, whether, "assuming it to be such a debt, it is one which is due to the official manager as such, on which he can ask for an adjudication in bankruptcy." As the Appellant is admitted to be a non-trader, he can only be liable if, in the words of the statute, the debt was a debt contracted after the passing of the Act of 1861. Both the questions must be answered in the negative. The opinion of the Lord Chancellor in the Court below proceeded almost entirely on the meaning he gave to the word "debt." He thought it must of necessity be "a sum certain—an ascertained sum;" and he thought it was "a definite sum, the obligation to pay which has arisen and been incurred since the passing of the Act." This was a mistake; it was a debt of the Appellant, under the terms of the company's deed of settlement, the moment it was incurred by the company, and all that was done after the winding-up order was merely to ascertain its amount. *Robinson's Executors* (2) was the case relied on by the other side. In that case there was much difference of opinion, but that case does not decide the present, for there the real question was whether a call had the same character as the contract in respect of which it was made, and so whether the call was a specialty debt. The decision was, that the debt, having arisen on a covenant in a deed of settlement, it must be treated as a specialty debt. That decision has no application here. So far as that case can be made applicable here, it is, on account of the observations there uttered, in favour of

(1) 33 L. J. (N. S.) Bankruptcy, 26; 3 N. R. 693.

(2) 3 Sm. & Giff. 272, S. C. on Appeal; 6 D. M. & G. 572.

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the Appellant, for they shew the call to be entirely dependent on the antecedent liability. The call is, in fact, the consequence of the obligation or debt, but is not itself either the one or the other. The Acts of 1848 and 1849 did not create any liability, but merely supplied the means of ascertaining and adjudicating its extent, and even the costs of the winding-up are themselves strictly attributable to the original liability. Besides, as a winding-up order has the effect of dissolving the company, no new liability can legally be created after the dissolution. The amount of those debts which existed before is then settled: nothing more. In another case (*Ex parte Canwell in re Vaughan*) (1) which was heard by the Lord Chancellor at the same time with the present, his Lordship put a construction on the *Companies Act* of 1862 not reconcilable, on principle, with his decision in this case. As to the 75th section of the Act of 1862, he said it was there "declared that the liability to contribute shall be deemed to create a debt accruing due from such person at the time when the liability commenced," and said that he was bound to hold that "the Legislature here considered it to relate back to the date of the contract." The same principle of construction is applicable to both that Act and the Act under which this question arises; they relate to similar subjects, and it was not intended to introduce differences between them. His Lordship confessed the apparent contradiction between his decisions in these two cases, and added, with regard to the Act of 1862, that though he had sought for a different date of the party's liability, he could "not find any other date or origin than the date of the settlement by which he became a partner." It was equally impossible to find a different date in the present case. It cannot be said, in any proper sense of the term, that the call created a debt; it merely declared the amount of it; the indebtedness, the liability of the Appellant, had been already settled. Lord *Westbury* said a debt was an ascertained sum, but there are many things proveable as debts, proveable under the *Bankruptcy Act* of 1849 (12 & 13 Vict. c. 106), which are not ascertained sums. By the 177th section of that Act, if a bankrupt shall have contracted a debt payable on a contingency which shall not have happened before the issuing of the fiat, the

(1) 33 L. J. (N. S.) Bankruptcy, 26; 3 N. R. 693; 10 Jur. N. S. 481. 4 De G. J. & S. 539

creditor may apply to the Court to set "a value on such debt," and, though the value may not have been ascertained before the contingency happened, the creditor may, after the contingency happens, prove in respect of such debt. Here the Legislature uses the word debt, and treats the contract itself as constituting that debt, though the contingency on which its amount is to be ascertained has not happened, and perhaps indeed may never happen. And the 178th section follows the same course. The moment an obligation is contracted a debt arises, though the amount may not then be ascertained. That is so in the case of a contract on a marine policy; and in *Kearns* v. *Leaf* (1) a person who was the holder of a life policy was held entitled to maintain an injunction to prevent a company from transferring its business to another company, contrary to the provisions of the deed of settlement, without making provision from its own assets for payment of his policy. This was not anything but the ordinary principle regulating both law and equity. The *Bankruptcy Act* of 1861 (24 & 25 Vict. c. 134), allows the proof of unascertained damages. They are to be ascertained (ss. 153, 154) under the direction of the Court, and when ascertained are to be proveable as "a debt due at the time of the bankruptcy." That shews what was the meaning which the Legislature itself put on the word "debt," as afterwards used in that statute. And the 25 & 26 Vict. c. 89, followed in the same course, and spoke (s. 158) of all debts, present or future, as proveable against a company. In the *Haytor Granite Company's Case* (2), on the winding-up of a company, a claim for future rent was allowed to be treated as a debt proveable against the estate of the lessee, in case the assignee of the lease should make default. In the case of claims on annuities, *Re the English & Irish Church & University Assurance Society* (3), under a winding-up, subsequent to the Act of 1857, but before the *Companies Act* of 1862, an annuitant was allowed to prove the estimated value of the annuity without first establishing the amount as a debt. These cases shew that the law recognised as debts matters which were not the subject of a present ascertained amount of liability.

In another class of cases, where a testator charged his real estate

(1) 1 H. & M. 681. (2) 1 Law Rep. Ch. 77. (3) 1 H. & M. 79.

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with his debts, future amounts arising from previous liabilities were held proveable; and even damages in respect of covenants entered into by him, but broken after his death, were admitted under that description: *Bermingham* v. *Burke* (1); *Morse* v. *Tucker* (2). A covenantee is a specialty creditor by virtue of the covenant, and can maintain a creditor's bill: *Whitmore* v. *Oxborrow* (3); and in *Hamer's Devisees* (4), where a widow and daughter had taken possession of the testator's property as executrixes, and received dividends on shares, the daughter, who was also ultimate devisee, was, after her mother's death, held liable to be put upon the list of contributories. The statute 3 & 4 Wm. 4, c. 104, on which that question was decided, had in fact treated the original liability as the obligation or debt, though the amount of it was not ascertained for years afterwards. The same principle had run through all the statutes from the 13 Eliz. c. 5, which was intended to prevent fraudulent conveyances to defeat creditors, up to the last *Bankruptcy Act*, which, like all its predecessors, aimed at preventing debtors from making attempts to defeat or delay their creditors.

There is no definition of "debtor" in the Act of 1861; but as to "creditor," there is an attempt at a definition which is hardly intelligible. In s. 229 it is said, "'creditor' shall mean also any two or more persons being partners, and incorporated and joint-stock companies;" and "'petitioning creditor' shall mean the creditor who filed the petition for adjudication." The meaning of the word "debt" must therefore be obtained from previous statutes and decisions. These shewed that debt meant obligation to render to another what was his, and did not depend on mere ascertainment of amount in order to assume that character. The definitions from the *Civil Law* which Lord *Westbury* desired to be referred to entirely justify this construction of the word. They shew that debt is the liability to pay, not the clear defined obligation to pay a settled and ascertained sum, but the general duty to discharge a liability: *Brissonius* (5); *Calvinus* (6). And *Pothier* (7) is to the

(1) 2 J. & Lat. 699.
(2) 5 Hare, 79.
(3) 2 Y. & C. Ch. 13.
(4) 2 D. M. & G. 366.
(5) Tit. "Debet."
(6) Mag. Lex. Jur. "Debet."
(7) Traite des Obligations, Pt. i. Ch. 1.

same effect. When this Appellant signed the deed, he became liable to the whole debts of the company, and to all calls, and as to them his debt was then contracted. Several sections of the *Winding-up Act* of 1848 (11 & 12 Vict. c. 45), shew that the act did not affect that liability, though it regulated, and in some instances restrained, the proceedings of creditors. Under the old bankrupt law, Lord *Eldon* said, *Ex parte Bryant* (1), that it was the reality, not the form, of a debt that was necessary to constitute a good petition for an adjudication, and therefore, though in that case the petitioner made an affidavit as for goods sold and delivered, when in fact he had entered up judgment in an action for them, his petition was held good. So in *Ex parte Griffiths* (2), a debt secured by a bond given while the obligor was a trader, was held not to be merged in the judgment obtained upon it after the obligor had ceased trading.

If then this was a debt, existing as a debt, before the order for winding up, it could not form a debt which, under the Act of 1861, only became due to the official manager after the passing of that Act, making him thereby a good petitioning creditor to ask for an adjudication in bankruptcy. The case of *Robinson's Executors* (3) was quoted in the Court below as decisive of the second point in this case. It has no bearing upon it. But there are cases which do directly bear upon it. *Greenshield's Case* (4); *Parbury's Case* (5); *Chapple's Case* (6); and *Ex parte Nicholas* (7). In the first it was held, that there was no liability in a shareholder to a call in respect of debts incurred by a joint-stock company after his bankruptcy. In *Parbury's Case* (5) an order was made in 1849 to wind up a railway company. *Parbury* was a shareholder;—he was in *India*. In June, 1853, he obtained a conditional discharge under the *Indian Insolvent Act;* that discharge was in the nature of a certificate; it was published in the *London Gazette*, and in July, 1854, was made absolute. In March, 1858, *Parbury's* name was put on the list of contributories, and a call was made on him in February, 1860. It was there argued that the call was a new debt, but it was held not to be so; the debt was his original liability as shareholder; his

(1) 1 Rose, 288.
(2) 3 D. M. & G. 174.
(3) 3 Sm. & Giff. 272; 6 D. M. & G. 572.
(4) 5 De G. & Sm. 599.
(5) 3 D. F. & J. 80.
(6) 5 De G. & Sm. 400.
(7) 2 D. M. & G. 271.

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certificate had discharged him from that. The Lord Chancellor there observed, "Long before the adjudication in *India* the company in which the Appellant was a shareholder had ceased to exist, and no new debts could be incurred. Before the bankruptcy all the events from which the demand arose had actually happened, and all the facts necessary to ascertain the Appellant's proportion and amount of the sum to be contributed were extant and capable of strict proof." In *Chapple's Case* (1) a certificate was also held to bar a call made in respect of a liability existing before the bankruptcy; and *Ex parte Nicholas* (2) proceeded on the same principle.

Then, was the Respondent a good petitioning creditor? He was not. First, the call was not a valid legal debt, it is a mere demand of payment of such a debt; it cannot therefore, under this Act, affect a non-trader. Secondly, the Act does not confer on an official manager the power to petition for an adjudication in bankruptcy. He is not the creditor, he is a mere official agent. A call does not necessarily involve indebtedness by the individual shareholder of the company to the person who makes the call. There might have been assets of the company sufficient to answer all demands; and then, of course, no shareholder could have been made a bankrupt. The Act of 1849 (12 & 13 Vict. c. 108, s. 28) involves both these matters. Even assuming that the Appellant was a contributory, it does not follow that the official manager was thereby made a petitioning creditor to obtain an adjudication in bankruptcy against him. *Guthrie* v. *Fisk* (3) establishes the principle that where an official is authorized to sue and be sued, though he may maintain an action, he cannot become a petitioning creditor.

Mr. *Bacon*, Q.C., and Mr. *Roxburgh*, for the Respondent:—

To understand the provision in the 90th section of the *Bankruptcy Act* of 1861, attention must be paid to some of the earlier statutes. The Act of 1848 provided a system by which the creditors of a company should be assured, and the rights of the contributors adjusted, amongst themselves. The 29th, 34th, 38th, 48th, 76th, and 83rd sections of that statute, read together, shew that the debt is a

(1) 5 De G. & Sm. 400. (2) 2 D. M. & G. 271. 17 Jun 6
(3) 3 B. & C. 178.

debt created by the Master's order for a call; other matters are merely events leading up to that result. There never was a debt between the Appellant and Respondent till the Master's order was issued. Now there is a debt. When was it created? By the call. In the words of the statute, a debt is only contracted when the relation of debtor and creditor subsists between two parties. When does that happen? When there is a debt clearly established. This deed provides that any proprietor shall be liable for all the debts of the company in proportion to his share. No debt existed then, and this was a provision to meet the occurrence when it should happen. The obligation imposed by the deed is one thing, the creation of a debt under the operation of the statute is another.

The case of *Robinson's Executors* (1) is exactly in point with the present. Mr. Justice *Erle* there noticed the argument that "the call became a specialty debt from the time of the liability," but dissented from it, and said, "The call creates an original liability by force of the statute," "and the duty of the contributory to pay arises only under the statute." So that even assuming the argument on the other side, that debt and duty are identical, the "duty" here, in the words of the learned Judge, "arose only under the statute." The demand made by the official manager is the creation of the statute; it is a legal demand; it is enforceable under the statute, and it does not necessarily refer to any previous liability; it springs from the authority of the law itself.

[LORD KINGSDOWN:—Suppose a life drops after the winding-up order, but the fund thereby created has been already obtained. What then?]

The additional sum would have to be raised. The object of the Act was to provide for payment of the company's debts; it is a continuing provision. The power to bring an action is altogether suspended by the winding-up order, and if the effect of that order did not continue, the creditor would be without any remedy. The Master would be impeded in the discharge of his duty if actions could go on while the winding-up order was in force. For that reason only, in the case of *The English & Irish Church & University*

(1) 3 Sm. & Giff. 272.

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Assurance Society (1), under a winding-up order subsequent to the Act of 1857, and before that of 1862, an annuitant was held entitled to prove against an insolvent company. The operations under the order having actually commenced, nothing is permitted to interfere with them. But that does not shew that the claims then presented are debts, until they have received the sanction of the Master, and have thus become an undisputed liability. Every facility is given under the winding-up order to persons to come in and establish their claims. That is shewn by the two cases of *The English & Irish Society* (1) and *Kearns* v. *Leaf* (2), besides which, in the latter case the funds of the company being positively pledged under the policy, the assured had a right to say, "they are, to the extent of my policy, my property, and without my assent you have no right to transfer them to others." The same principle governed the decision in the *Haytor Granite Company's Case* (3), where the lessor had a legal right to have provision made for payment of his rent under the covenants of an existing lease. The case of *Hamer's Devisees* (4) has nothing to do with the present. There the daughter was a devisee of property in respect of which the liability was fixed upon her, and had been personally receiving benefit from it up to the time when she was declared liable upon it. Such a case cannot, in the least degree, illustrate the question, whether a debt is created by an undertaking made when nothing is due, or by a statutory declaration of indebtedness after something has been ascertained to be due. *Parbury's Case* (5), *Greenshield's Case* (6), *Chapple's Case* (7), and *Nicholas' Case* (8), are all of one and the same class, and merely shew that a man may not be put into the list of contributories if he has received his discharge under a Bankruptcy Act before the winding-up order was issued, the reason being that that discharge, made by a competent authority, released him from liability to incur a debt in respect of previous obligations. But the assignee of such a person may be put into the list of contributories, for he has assumed all the liabilities of the insolvent or bankrupt, and he may be so put, not

(1) 1 H. & M. 79.
(2) Ibid. 681.
(3) 1 Law Rep. Ch. 77.
(4) 2 D. M. & G. 366.
(5) 3 D. F. & J. 80.
(6) 5 De G. & Sm. 399.
(7) Ibid. 400.
(8) 2 D. M. & G. 271.

perhaps for the absolute purpose of paying debts, for he is not bound to pay them unless he has assets, but for the purpose of ascertaining the proportions of the debts due from the contributories. The debts become due, become debts, on the order of the Master, for the amount of the liability is then ascertained.

The word "debt," on the meaning of which the judgment of the Court below was founded, does not mean debt in the universal sense of the term, and therefore many of the illustrations referred to on the other side are inapplicable. The meaning given to it here was the meaning properly applicable to it under this particular section of the Act of 1861. And the same observation applies to the definition of the petitioning creditor. Till the passing of this statute no relation of debtor and creditor did exist, none could exist between the Appellant and Respondent. Suppose a guarantie given by a company to bankers ten years before the passing of the Act, then the Act passes and then the company breaks up, there can be no doubt that then, and then only, the sum secured by the guarantie becomes a debt. A debt can only be so when it is something which, in the words of Lord *Westbury*, "arises from a contract, or by operation of law." It was in this latter character alone that a debt existed here, and that operation was the operation of the Act of 1861, and consequently this was a debt contracted after the passing of that Act.

The case of *Guthrie* v. *Fisk* (1) does not affect the present. That was a mere question as to the extent of the rights conferred by particular words in an Act of Parliament, and the Act being in derogation of the Common Law, it was held that it must be construed strictly, and, consequently, words which conferred a power of a particular sort could not be extended so as to confer a power of a different and more extended sort. The official manager being a person who had statutory power to enforce payment of a debt, was properly a petitioning creditor in respect of it.

March 11. THE LORD CHANCELLOR (Lord *Cranworth*) :—

My Lords, this case was heard at your Lordships' bar a short time since, and being one of some nicety, your Lordships took time to consider of the judgment which ought to be given.

(1) 3 B. & C. 178.

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It is an appeal from an Order in Bankruptcy made by Lord *Westbury* on the 7th of May, 1864, confirming an order made under his Lordship's direction by Mr. Commissioner *Goulburn* on the 21st March, 1864, whereby the Appellant had been adjudged to be a bankrupt.

The facts were these. [His Lordship stated them: see *ante*, pp. 9-10.]

In the month of November, 1863, the official manager filed his petition in the Court of Bankruptcy, praying that the Appellant might be adjudicated a bankrupt. Mr. Commissioner *Goulburn*, before whom the petition was pending, declined to adjudge the Appellant a bankrupt, on the ground that, as he was not a trader, there was not, under the statute, a good petitioning creditor's debt. He thought that the debt relied on by the official manager was a debt contracted before the passing of the *Bankruptcy Act* of 1861, and therefore was not a debt on which the Appellant could be made a bankrupt.

From this decision of the Commissioner the official manager appealed to the Lord Chancellor; the question being whether the sum which the now Appellant was, in November, 1863, ordered to pay to the official manager, was a debt contracted after 1861. The Commissioner had decided that it was not, that it was, in fact, merely the ascertainment of the amount of a liability which he had incurred in 1849. Lord *Westbury*, however, was of a different opinion. He thought that as there was no liability to pay before the making of the calls and the order to enforce payment, therefore the date of that order and not the time of the execution of the deed, must be treated as the time when the debt was contracted. His Lordship therefore reversed the order of the Commissioner, and sent the case back to him. Upon this Mr. Commissioner *Goulburn*, on the 21st of March, 1864, adjudicated the Appellant a bankrupt.

From this adjudication the Appellant appealed to the Lord Chancellor. His Lordship, as a matter of course, dismissed the appeal, but considering the case to be one of some doubt, gave leave to the Appellant to bring it before this House upon a special case, stating the facts on which your Lordships might finally adjudicate. This was accordingly done, and the case was fully

argued at your Lordships' bar a short time since, the sole question being whether the sum ordered to be paid by the Appellant to the official manager constituted a good petitioning creditor's debt.

For the Appellant it was argued, that the sum which he was ordered to pay to the official manager ought not to be treated as a debt contracted by him after the passing of the *Bankruptcy Act* of 1861, and, therefore, that inasmuch as he is not a trader, and as by the 90th section of that Act it is expressly provided that "the debt of the petitioning creditor, of any debtor not being a trader," must be a debt contracted after the passing of that Act, therefore there was no debt on which an adjudication against him could be supported. It was farther contended, that the official manager is not a creditor within the meaning of the Bankrupt Laws.

On the part of the official manager it was contended, that by the express provisions of the *Winding-up Act*, he became a creditor for all sums ordered to be paid to him on account of calls, and that having so become a creditor of the Appellant in 1863, and not before, he was not affected by the provisions of the 90th section of the Act of 1861.

The question on the 90th section turned, it will be observed, on the point whether the date of the Appellant's debt is to be held to be the year 1849, when he executed the deed of the company, and so became liable to its obligations, or the 23rd of July, 1863, when he first became actually bound to pay any ascertained sum arising out of that liability. In order to decide this, it is necessary to consider why the exception in question, relating to non-traders, was introduced. The motive of the Legislature, in introducing the 90th section, evidently was the hardship which the new Act would inflict on persons not in trade, who, having contracted debts before the passing of the Act, might by its operation be subject to penal and other consequences, to which they had not by the mere contracting of the debts exposed themselves. It is impossible to mistake the object, or not to feel the justice of the enactment, and in determining in any particular case whether the debt on which it is sought to make a non-trader a bankrupt, is, or is not, a debt contracted after the passing of the Act of 1861, the grounds on which the section in question rests must be kept steadily in view.

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It is to be construed as a remedial enactment, and all Courts are bound on general principles to put on it such a construction as will best give effect to the remedy contemplated.

Looking, then, to the section in this spirit, I am prepared to say that in my opinion no debt founded on contract is sufficient to warrant an adjudication of bankruptcy against a person not a trader, unless it was contracted by him at a time when he knew, or might have known, that he thereby made himself liable to the Bankruptcy Laws, and this must have been after the passing of the Act of 1861. The language of the section appears to me wide enough to warrant this interpretation of it; and any narrower construction might leave the evil in question unremedied. If this be a just construction of the statute, it is plain that the calls made on the Appellant, and ordered to be paid by him to the official manager, cannot be treated as a debt contracted by him after the passing of the Act of 1861. They constitute an obligation cast on him by law, after the passing of the Act, in consequence of engagements which he had entered into long previously. This obligation must, I think, in construing the 90th section, be referred back to the year 1849, when he became a shareholder and executed the deed. By what he then did, he knew that he might become liable to pay such calls as are now imposed upon him. But he did not, and could not know that he was incurring a liability which might end in his being made a bankrupt. And it was to protect him against that unanticipated consequence that the 90th section was passed.

The conclusion at which I have thus arrived is at variance with that adopted by Lord *Westbury*. It is unnecessary, therefore, to say, that though his Lordship evidently considered it a case of doubt, I have felt at times, in considering the subject, distrustful of my own judgment. Lord *Westbury* founds his opinion on the fact, that until the final adjustment of the liabilities of the different shareholders there was no obligation to pay—there was no debt—that though there might, before the making of the call, have been a liability *in posse*, yet till the whole state of the accounts had been ascertained, and the proper calls made, there was no liability *in esse*. It is impossible to deny this—but according to my construction of the clause in question, there was

no debt capable of sustaining an adjudication, unless the liability *in posse*, as well as that *in esse*, originated subsequently to the Act of 1861. The order to pay to the official manager was only a mode of enforcing the performance of the original contract into which Mr. *Williams* had entered in 1849—and I can discover no ground for holding that the obligation to make this payment to the official manager is a debt contracted after 1861, which would not equally apply to a simple contract debt incurred before 1861, but sued for and recovered, and so converted into a judgment debt after 1861.

It was argued at the bar, that even if this could be regarded as a liability arising after the Act of 1861, yet the obligation to pay the amount of the calls to the official manager did not make him a creditor at whose instance the person liable to pay the amount of the calls could be adjudicated a bankrupt. I am far from saying that there is not great force in this objection. It may be argued that the official manager is a mere officer of the Court, bound to act only according to its orders, and that the order for payment to him no more makes him a creditor than, if the order had been to pay the calls into the *Bank of England* that body would have become a creditor. On this point, however, I do not feel bound to express an opinion, having already stated grounds quite satisfactory to my mind that, even if the amount of the calls is a debt due to the official manager, yet it is not a debt contracted since passing of the Act of 1861.

I am, therefore, prepared to advise your Lordships to reverse the order of the 7th of May, 1864, confirming the previous order of the 21st of March, 1864, which adjudicated the Appellant a bankrupt.

All costs paid by the Appellant under the order of the 7th of May, 1864, must be repaid to him, and the official manager must also pay to him the costs occasioned on the first appeal to Lord *Westbury*.

LORD CHELMSFORD:—

My Lords, the question to be decided upon this special case is whether the sum due from the Appellant was a debt contracted with the official manager constituting a good petitioning creditor's

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debt upon which he could found a Petition for an adjudication in bankruptcy against the Appellant. The question is one of general importance.

There is no dispute upon the facts of the case. The Appellant was the proprietor of 500 shares in the company, which was dissolved and wound up by an order of the Master of the Rolls before the passing of the *Bankruptcy Act* of 1861. As such proprietor he was liable to contribute to the debts of the company, and accordingly, after the passing of the Act, on the 28th of November, 1861, he was settled on the list of contributories. On the 10th of May, 1862, and on the 4th of June, 1863, two calls were made on the contributories by order of the Master of the Rolls, and the sum due from the Appellant in respect of these calls was the £1921 13*s.* 8*d.* upon which the question arises.

There can be no doubt that, as a proprietor, the Appellant was liable to the company to the extent of his shares, and liable beyond that amount to the creditors of the company as a partner. It is in respect of this latter liability that he was placed on the list of contributories, and that the calls were made upon him. If, therefore, the view which I have taken of this case rendered it necessary for me to consider whether the amount which the Appellant was ordered to contribute towards the liquidation of debts, to which he was antecedentally liable, could be regarded in the sense of the *Bankruptcy Act*, 1861, as a debt contracted after the passing of that Act, I have no doubt that I should agree with the opinions expressed by my noble and learned friend on the Woolsack. But even assuming it to be such a debt, on account of its becoming due from the Appellant only by reason of the order for calls, the question would still remain whether the relation of debtor and creditor existed between the official manager and the contributory in respect of it.

Now, the powers and duties of the official manager are created by Acts of Parliament, which must be examined to ascertain the nature of his office and the authority with which he is invested.

3 Ch 170

The two Acts which apply to this question are the *Winding-up Acts* of the 11 & 12 Vict. c. 45 and the 12 & 13 Vict. c. 108. By the 22nd section of the former Act the official manager was appointed by the Master of the Court of Chancery, and by the

29th section, on his appointment, all the estate, effects, and credits and rights of action of the company became absolutely vested in him. By the 34th section his duties are prescribed, and by the 50th and following sections he is to represent the company in all actions, suits, or other proceedings pending, or which might have been instituted, either by or against the company. All these sections relate to the claims and liabilities of the company previously existing, and have no application to calls for contribution upon the shareholders after the winding-up order has been issued. The sections which apply to the subject of calls upon the contributories will be found to give the power of ordering and enforcing them to the Master, leaving to the official manager merely the duty of acting under his orders and obeying his directions. By the 82nd section the Master is to direct the official manager as to the application of the realized moneys and assets of the company. By the 83rd and 84th sections the Master is to make calls and to apportion their amount amongst the contributories, and by the 88th section it is only with the approbation of the Master that the official manager is empowered to enforce the payment of calls, or to give time to, or compound with the contributories. The Master also, by the 89th section, may direct any action or suit to be brought by the official manager against the executor of a deceased contributory, which without such previous direction the official manager is incompetent to bring. These are all the material sections of the first of the Winding-up Acts which relate to the duties of the official manager, and by none of them is he clothed with the character of a creditor of the contributories in respect of the calls made upon them.

The other *Winding-up Act* (the 12 & 13 Vict. c. 108) makes no change in the relation of the official manager to the contributories. By the 8th section he is empowered to draw, accept, make, and endorse bills of exchange and promissory notes, but still under the direction of the Master acting in the winding-up of the company. And to come nearer to the present subject of consideration, by the 30th section, "where any contributory of the company is a bankrupt or insolvent, the official manager may prove in the matter of such bankruptcy or insolvency," (not as he shall think proper, but) "for any balance ordered by the master to be proved against the estate of such contributory."

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Upon a review, then, of all the sections of the Winding-up Acts relating to the official manager, there appears to me to be none from which it can be inferred that it was the intention of the Legislature to place him in the position of a creditor, so as to render the contributory's liability to a call made upon him a debt, for the recovery of which the official manager would have the remedies of any ordinary creditor. He is rather the mere instrument by which the Master acts in carrying out his duty of winding up the company.

But proceeding a step farther, and assuming for a moment the liability of the Appellant to the payment of the amount of the calls to be a debt due to the official manager, how can it become a good petitioning creditor's debt, unless it is so constituted by the Acts of Parliament? All the authority of the Master and of the official manager is derived from the Winding-up Acts. Beyond the limits of this statutable authority they have no power to proceed. In no part of these Acts is there to be found anything which enables the Master to direct the official manager to petition for an adjudication in bankruptcy. That the general power given to the official manager, with the approbation of the Master, to enforce the payment of claims against the contributories does not enable him to resort to every form and manner of proceeding for the purpose, appears from the case of *Guthrie* v. *Fisk* (1), cited in the argument; and I would borrow the language of Mr. Justice *Bayley* in that case, and say, "unless we see very clearly that the meaning of the Legislature goes beyond the words of the statute, we cannot do so." It may be that the Legislature purposely withheld from the Master the power to order a petition for adjudication in bankruptcy against a contributory, because to such a proceeding a petitioning creditor's debt is essential, and there was no person to whom such a debt could be said to be due.

The view of the question which I have taken precludes the necessity of considering the elaborate arguments which have been addressed to your Lordships upon antecedent liability, contingent debts, and the decision in *Robinson's Case*, which was claimed by the counsel on both sides as an authority in their favour, but which has little (if any) bearing upon the question one way or the other.

(1) 3 B. & C. 178.

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The question has presented itself to my mind under a different aspect from that in which it was mainly regarded in the argument at your Lordships' bar; but the close examination of the Acts of Parliament which this view of the subject has led me to make, has satisfied me that there could not possibly exist any petitioning creditor's debt due to the official manager, upon which his petition for an adjudication in bankruptcy could be validly founded.

LORD KINGSDOWN:—

My Lords, the first question in this case is, whether the debt upon which the commission was sued out was a debt contracted before the passing of the *Bankruptcy Act* of 1861.

At the time when the winding-up order was pronounced, the Appellant, as regarding the creditors of the concern, was liable to the whole amount of all the debts. His liability to his partners was to pay such calls as were covenanted by the deed to be paid, and such farther sums as might be necessary finally to wind up and close the partnership, having regard to the contributions of other shareholders. The amount which he might have to pay under either of these liabilities was necessarily uncertain until the accounts were settled, but the liability to pay already existed.

The whole purpose of calls to be made under the statute is to give effect to the liability so existing. The official manager is required by the statute to apportion the sums necessary to be paid amongst the several contributories, and by the 83rd section, the Master is authorized to make calls on the contributories, or on such individual contributories, or classes of contributories, as he may think proper (*but so far only as such contributories shall be liable at law, or in equity, to pay the same*). By the 84th section, the sum to be raised by calls is to be apportioned amongst the several contributories, according to their proper liabilities.

The calls, therefore, are to be made entirely in respect of liabilities previously existing. The payment of the amount of the calls is to be made to the official manager, not because he is by the Act constituted a creditor of the persons by whom the payments are to be made, but because he is constituted a trustee, to whom debts already due by other persons are to be paid, in order that by his means those other persons may receive, in a more convenient

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form, what is due to them. The call does not, in my opinion, constitute a new debt, but ascertains the amount and provides for the payment of a debt already due. The debt, therefore, in this case was not, I think, a debt contracted after the *Bankruptcy Act* of 1861 was passed.

But farther, it does not seem to me to be a debt in the strict sense of the term, or at all events a debt on which the official manager, as a creditor, could sue out a Commission of Bankruptcy. The call provides for payment of sums to the official manager for a special purpose, and it also prescribes the mode in which the payment is to be enforced.

It is not quite accurate to say that the statute gives to the official manager a general power to enforce the payment. The only clause which contains words of that description is the 88th, which gives power to the official manager, with the approbation of the Master, from time to time to enforce payment, or to compound, or to abandon any claim, but the mode in which payment is to be enforced must be the mode pointed out in the Act. Now the 95th section enacts, that all orders of the Master under this Act shall be enforced in the same manner by the same, or any such process, as Orders of the Court of Chancery made in any suit pending therein against any party thereto. Other modes of proceeding are also pointed out. The official manager may, in certain cases, prove for the amount of the call, under any bankruptcy or insolvency, and may also, with the approbation of the Master, bring actions or defend actions (ss. 60, 62), but I can find no clause which authorizes him, either with or without the approbation of the Master, to sue out any proceeding in Bankruptcy.

The case of *Robinson's Executors* v. *The Royal Australian Bank* (1), usually cited as *Robinson's Case*, does not seem to me to affect materially the decision of this case. The question there was whether a call made by the Master under the *Winding-up Act* was a specialty debt. It was contended to be so, on the ground that it was the enforcement of a debt which, by the deed of partnership, this partner had covenanted to pay. It was finally held, after much discussion and some difference of opinion, that it was not so, and, as I read the case, upon this ground, that it was an

(1) 3 Sm. & Giff. 272; 6 D. M. & G. 572.

enforcement of the obligation which the partner had contracted by entering into the partnership business, and not the enforcement of the specific covenants contained in the deed. The Lord Chancellor puts it entirely on this ground, and says that though a call by the directors under the third clause would constitute a specialty debt, the call by the official manager had no reference to that clause. It is not to be denied that the opinion of Lord Chief Justice *Erle* sitting with Vice-Chancellor *Stuart*, seems to proceed upon the ground that, by the terms of the statute, the call created a new liability, but that is a view to which I am unable to assent, at least, as applied to the present question.

The Act here has provided that the debt upon which a petition for an adjudication in bankruptcy may be founded against a non-trader must be one contracted after the *Bankruptcy Act* of 1861 was passed. The object was to protect persons from the consequence of *ex post facto* legislation. The debt, I think, must arise from some act or default of the debtor after that time.

The decision in *Parbury's Case* (1), and the observations of the judges, do not seem to me to be quite consistent with the view taken in *Robinson's Case* by Lord Chief Justice *Erle*.

The *Companies Act* of 1862 (25 & 26 Vict. c. 89) has removed all doubt about subsequent cases by expressly declaring that the call shall constitute a debt as from the time when the liability was contracted. I do not consider that declaration as an alteration of existing law, but as a declaration of what the Legislature in its previous Act had not sufficiently explained. It may be observed that it declares that the call shall constitute a specialty debt.

Upon the whole, I think, that upon both the points suggested in the special case, the order appealed from should be reversed.

Orders reversed, with directions as to costs in the Court below.

Lords' Journals, March 12, 1866.

Solicitors for the Appellant: *Harrison & Lewis.*
Solicitors for the Respondent: *Amory, Travers, & Smith.*

(1) 3 D. F. & J. 80.

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April 30.

CHARLOTTE TREVILLIAN AND OTHERS . . APPELLANTS;
AND
WILLIAM KNIGHT AND OTHERS . . . . . RESPONDENTS.

Parties—Next of kin—Practice—10 & 11 *Vict.* c. 96.

7 Ch 219

Where, upon the construction of a will, there was a doubt whether an intestacy might not be declared, and where the fund to be distributed had been paid into Court under the *Trustee Relief Act*, 10 & 11 Vict. c. 96, the House declined to proceed with the appeal in the absence of any one to represent the next of kin, and the appeal was ordered to stand over in order to enable the parties contesting the construction of the will to apply to the Court below on the subject. The case was then to be heard on a supplemental Petition.

THIS was an appeal against an order of the Master of the Rolls, which had been confirmed by the Lords Justices.

The question in the case arose on the will of *Richard Corrie*, dated 30th of July, 1801, by which (among other things), after appointing three persons his executors and trustees, he gave them all the residue of his personal estate on trust, as to £15,000 Three per Cents., to pay the dividends to his wife for life, and upon farther trust, after paying debts and funeral expenses, to place out all the residue at interest in the public funds, and pay the dividends to his sister, *Mary Streatwells*, for her life; and as to the whole fund, after the death of the wife and sister, the will went on thus:—"And I desire the interest of all to be paid and applied, and I give and bequeath equally between my nephew, *John Corrie*, and his sister, my niece, *Mary Portal*" (free from her husband's control), "for life, and after her decease and the decease of my said nephew, respectively, I give and bequeath the principal monies equally among their *issue*, if there be any *child or children* to take the share of their deceased parent; and in case *both* my nephew and niece *both* die without issue, or leaving issue, they shall die under the age of twenty-one years without issue, then I give the share of him, her, or they so dying to the other of them, of (1) his

(1) It will be seen that this devise is full of verbal inaccuracies. This word *of*, it was agreed in the Court below by both sides, ought to have been *or*; and as to the word *both*, twice repeated, it was at the Rolls "conceded that this word *both* meant *either*."

or her issue, if he or she then be dead leaving issue aforesaid. But if both my nephew and niece aforesaid shall die without *issue aforesaid*, then and in that case my will and desire is, that a moiety or half part of the interest and principal, including a moiety or half part left in trust for my wife after her decease, be paid by my executors and trustees. And I give and bequeath the same to my aforesaid cousin, *Robert Campbell*, and his heirs; and as for and concerning the other moiety or half part of all the principal and interest, including the moiety and half part of that interest for my wife after her decease, I give and bequeath to my aforesaid cousin, *Mary Lowrie*, and her issue."

The testator died in 1807. *Mary Portal*, the niece, died in 1811, having had eight children, one of whom died in the testator's lifetime, and four others not long afterwards, all five being infants and unmarried. The testator's sister died in 1818, and his widow in 1824. The nephew, *John Corrie* (brother of *Mary Portal*) died in 1862, without ever having had any issue. All the children of *Mary Portal* who survived *Richard Corrie* married and had children. After investing the sum of £15,000 in Consols, the clear residue of the testator's property was found to amount to £6,268 6*s.* 8*d.* Three per Cents., and one moiety of these two sums was, on the death of the testator's widow, divided between the three daughters of *Mary Portal*—namely, *Caroline* (*Knight*), *Frances* (*Murray*), and *Charlotte* (*Trevillian*). In July, 1863, the surviving trustees transferred, under *The Trustee Relief Act* (10 & 11 Vict. c. 96) the other moiety into the name of the Accountant-General, to abide the orders of the Court. In May, 1863, Mr. *Knight*, as administrator of his deceased wife, *Caroline* (formerly *Caroline Portal*), presented a petition to the Master of the Rolls, praying that his interest in the same might be declared; and in May, 1863, his Honour declared that "'issue' in the first part of the will meant 'children,' but in the latter part of the will meant 'issue generally,' and that on the death of the nephew all the issue of the niece then living took *per capita*," and made an order to that effect, and directed the usual inquiries (2). On appeal the Lords Justices differed, and so the order stood affirmed.

This was an appeal against that order.

(1) 32 Beav. 426.

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TREVILLIAN v. KNIGHT.

The *Attorney-General* (Sir *R. Palmer*), Mr. *Rolt,* and Mr. *Schomberg,* for the Appellants :—

After the case had been partly opened on the question of construction of the will—

[LORD WESTBURY inquired whether the next of kin were represented here, and observed that there could be no gift to the issue of *Mary* unless the word *both* in the will could be shewn to mean *either.* It might be argued that the whole gift was void.]

It was answered that it had been agreed between the parties in the Court below to treat the word *both* as signifying *either.* The statement of the Case of the three persons who appeared as executors of *George Rutt* was read in order to shew that the possible interests of the next of kin had not been overlooked. *George Rutt* was the surviving trustee and executor of the testator, *Richard Corrie,* and *Henry Rutt* was the executor of *George Rutt,* and was also one of the executors of *John Corrie.* The statement made in the Case of these three persons, who were some of the Respondents in Mr. *Knight's* petition for the distribution of the fund in Court, shewed that intestacy had been a subject of consideration in the Court below. The statement was this: "The petition stated who, according to the different constructions of the testator's will, would be the parties entitled to the fund, and also stated who were the testator's next of kin, and the legal personal representatives of such next of kin as were deceased, in order that the parties who would be entitled in case of intestacy, by reason of uncertainty or remoteness, might be represented, and such parties were accordingly represented on the hearing of the petition (1). Among such next of kin was the said *John Corrie.*" Mr. *Henry Rutt, John Corrie's* executor, was one of the Respondents in the present appeal. There was matter of substance here sufficient to dispose of the case; all the parties substantially interested were before the House; and the House had not been in the habit of sending back a case on a mere point of form, unless clearly satisfied that the justice of the case required such a course. The will was too clear for an intestacy to be declared. The only

(1) It did not appear that this statement was verified by affidavit.

real question was, in what shares and proportions the property was to be distributed.

LORD WESTBURY:—

This is a trust fund; it is distributable in one manner or another, according to a particular construction of the will. The fund has been paid into Court, and that makes it more than ever desirable that the Court should be particularly scrupulous in determining on its administration. The appeal should stand over, with liberty to apply to the Court to be allowed to take such steps as may be deemed necessary to bring the next of kin before the Court, and with liberty to re-enrol the order when pronounced, and to bring it up by way of supplemental petition without the necessity of any new appeal.

THE LORD CHANCELLOR (Lord *Cranworth*):—

I am inclined to think that the next of kin here have no interest whatever, either on account of intestacy or remoteness, but still it is not so clear as to prevent all argument on that point. I cannot say that the Court ought not to have required the next of kin to be brought before it. The Court cannot deal with a fund which is put into its hands as a trustee without being satisfied as to the real title of the claimants of the fund, and that it is not parting with the fund to an improper person, to the disadvantage of some one who is not present, who is not represented in Court.

LORD CHELMSFORD:—

I entertain the same opinion as to any possible claim by the next of kin, but I cannot say that it is so clear that we ought to decide the case without being satisfied that all interests are duly represented.

Mr. *Selwyn*, Q.C., Mr. *Speed*, and Mr. *Leigh Pemberton*, were for the Respondents.

It was Ordered that the appeal do stand over, with liberty to either of the parties to apply to the Court below to vacate the enrolment, and to take such steps as they may be advised to bring some one or more of the next of kin before the Court,

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in order that the rights of the next of kin may be adjudicated upon; that the order be re-enrolled, and brought up again to this House by a supplemental petition, without the necessity of any new appeal.

Solicitors for the Appellants: *W. J. Hill, E. F. Sealy.*

Solicitors for the various Respondents: *Benbow, Tucker, & Saltwell; Crawley, Arnold, & Green;* and *Skilbeck & Griffith.*

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March 16, 19, 20, 23; *April* 20.

R. H. GALLOWAY . . . . . APPELLANT;

AND

THE MAYOR AND COMMONALTY OF LONDON . . . . . RESPONDENTS.

ET E CONTRA.

Corporation—Public Improvements—Railway Bills—Compulsory Powers—Agreement to sell land made before Act enabling its purchase.

Where persons have special powers conferred on them by Parliament for effecting a particular purpose they cannot be allowed to exercise those powers for any purpose of a collateral kind. Therefore, a company authorized (making due compensation) to take compulsorily the lands of any person for a definite object may be restrained by injunction from any attempt to take them for another object.

Where the Legislature has conceded power to a body of adventurers for a certain purpose (as for example the formation of a railway) such a body must shew some ground for the concession, and the Legislature has no concern with its means for obtaining the funds to carry its declared objects into effect, and in order to effect them it must not exceed the limits of its powers. But the case is different where an existing public body, such as the corporation of a city, is entrusted by the Legislature with the duty of making public improvements in its city, and the powers thus entrusted to it for such a purpose will not be subject, as in the other case, to a strict and restrictive construction.

Where, therefore, the Mayor and Commonalty of the City of *London* had been intrusted with powers to make certain public improvements in the *City*, and for that purpose had been authorized compulsorily to take land, to raise money on the credit of it, and to sell *superfluous* land to pay off the debt, the Act which gave them those powers, though only thus impliedly authorizing them to take more land than might be absolutely necessary to effect the desired improvements, might be construed favourably to them, and lands so taken might be treated as lands taken "for the purposes of the Act."

A contract made by the Mayor, &c., with another body to obtain lands

under the Act, and to sell such lands to that other body as soon as it had passed, would not be illegal.

Before the royal assent was given to an Act of this description the Mayor and Commonalty entered into a contract with a railway company to sell to the company certain lands which the Mayor and Commonalty expected to be authorized by the Act to take. When the Act had been passed, notice to take the land was given, and the taking was resisted by the land owner. A subsequent Act recited the contract, and declared the company entitled to the benefit of it. Notice to take the land under this later Act was given by the Mayor and Commonalty to the land owner, but the notice expressly reserved to them all their rights under the former Act:—

Held, that the original contract was valid, and that this later Act was a parliamentary recognition of it.

THESE were appeals against decrees in suits in which *Richard Hodgson Galloway* was the Plaintiff, and the Mayor, Aldermen, and Citizens of *London* were the Defendants. In the second suit the *Metropolitan Railway Company* had been introduced as a party (1).

In the year 1847, certain improvements were projected in the streets and thoroughfares of the City of *London*, and an Act called the *London City Improvement Act*, 1847, was passed, giving to the Mayor and Citizens certain powers with a view to carry these improvements into effect. This Act was afterwards known as the *Model Act*. In the year 1854 a company was created with authority, by the *Metropolitan Railway Act*, 1854, to construct a railway, now known as the *Underground Railway*, which was to come into the *City* near what are now called *Victoria* and *Farringdon Streets*. The 94th section of this Act empowers the company to make contracts with the Mayor and Corporation of *London* for the purchase and sale of lands in reference to the purposes of the Act. Another Act, passed in 1859, authorized the Mayor and Citizens to subscribe to the undertaking for any sum not exceeding £200,000. They did so subscribe. By this Act of 1859 the railway company obtained in fact powers to take Mr. *Galloway's* property on the northern side of *West Street, Smithfield*. Those powers were not exercised; they expired in the commencement of August, 1862. In 1860 three Acts were passed for the purpose of making alterations in the *City*. The first, called the *Metropolitan Railway Act*, 1860, related to the company; the second was called the *Metropolitan*

(1) 4 N. R. 77, 422; 5 Id. 355;

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Meat & Poultry Market Act, 1860. The object of this Act was to create a meat and poultry market at *Smithfield*, and to furnish it with proper approaches. It incorporated many of the provisions of the *Lands Clauses Consolidation Act*, 1845, and the provisions of the *London City Improvement Act*, 1847, and it empowered the Mayor and Corporation to enter into arrangements with the railway company as to the approaches. By clause 18 it forbade the opening of the market "until a road sixty feet in width shall have been made and opened from *Victoria Street*, at or near *West Street*," in *St. Sepulchre's* parish, to the intended market. The third of these Acts was called the *London Railway & Storehouses Depôt Act*, 1860, and authorized the construction of a street to connect the *Metropolitan Railway* with the meat market. Both the two latter Acts received the royal assent on the 13th of August, 1860. Three other Acts, called the *London Railway Depôt & Storehouses Act*, 1862; the *Metropolitan Railway Act*, 1862; and the *Metropolitan Meat & Poultry Market* (*Western Approach*) *Act*, 1862, passed in the session of that year. Their common object was, to facilitate the arrangements between the Corporation and the company, and to give the Corporation additional powers as to taking land, &c. The first two passed on the 30th June, 1862; the last on the 29th July, 1862. All the lands of the Plaintiff on the north and south sides of *West Street* were included in these Acts.

While these Acts were passing through Parliament, and before they had received the royal assent, namely, on the 26th of June, 1862, the Defendants entered into an agreement with the *Metropolitan Railway Company* for the sale to the company of certain lands which that company required for the purposes of its undertaking. Among these were pieces of lands on both sides of *West Street*, partly freehold and partly held by the Plaintiff under a lease from the Dean and Chapter of *Ely*. The agreement recited the bill then pending in Parliament (afterwards called the *Metropolitan Meat & Poultry Market* (*Western Approach*) *Act*), and by Article 2 declared, "If the pending bill shall pass into a law, the following articles shall have effect." Article 3 declared that "The Corporation with the utmost practicable despatch will purchase and procure, to be vested in themselves, so much of the lands shewn on the annexed

plan, and comprised," &c. (giving the description), "as is necessary for enabling the company to have the benefit of articles," &c., &c. Article 10: "The Corporation will give to the company possession of such parts of the land," &c. Article 11: "The Corporation with all reasonable despatch will convey to the company the whole of the land shewn on the annexed plan, and lying northward of the intended street, and comprised within the red border, in the annexed plan, with the right," &c. The lands thus to be conveyed included the lands of the Plaintiff.

On the 30th of April, 1863, the Defendants served the Plaintiff with a notice to take his lands under the *Metropolitan Meat & Poultry Market* (*Western Approach*) *Act*, 1862, and afterwards, as they did not agree about the price which he asked (£65,000), they took proceedings for having the value assessed by a jury. On the 6th of February, 1864, the Plaintiff filed his bill in Chancery, praying that the Defendants might be restrained from carrying this intention into effect, alleging that his lands were not required by the Defendants for the purposes authorized by the Act, but for the purpose of reselling to the company, and praying that they might be restrained from misapplying in any way the powers given them by that Act so as to affect the Appellant. On the 19th of February, 1864, a motion was made before Vice-Chancellor *Wood* for an injunction. The Vice-Chancellor was of opinion that the Plaintiff was not entitled to an injunction, but, as it was declared that the case would be carried to a Court of Appeal, the injunction was granted for a month. On the 26th of April, 1864, the Lords Justices on appeal granted the injunction until the portion *boná fide* required to be purchased for the purposes of the Act should have been ascertained, and until the Defendants should have given the Plaintiff proper notice, under the last named Act of 1862, of their intention to take the same, and a proper opportunity of coming to an agreement with them as to the compensation. On the 28th of July, 1864, the cause came on for hearing before Vice-Chancellor *Wood*, who, though adhering to his original opinion (acting on that of the Lords Justices), pronounced a decree declaring that the agreement had been entered into previous to the passing of the Act, and that the notice was not given in due exercise of the powers vested in the Defendants under the Act,

(1) Reported 10 Jur. N.S. 552; 2 Dey J. & S. 213

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and the injunction was ordered to be made perpetual. The Corporation appealed against this decree.

During the session of 1864, a bill, subsequently known as the *Holborn Valley Improvement Act*, 1864, was introduced into Parliament. The Plaintiff opposed the bill, but it passed, and included among its sections one (37th) which was in the following terms:—"And whereas certain lands may be taken under the powers of this Act which were delineated on the plans and described in the books of reference mentioned in the 4th section of the *Metropolitan Meat & Poultry Market (Western Approach) Act*, 1862, and in respect of which lands an agreement was, under the authority of that Act and the *Metropolitan Railway Acts*, entered into between the said Mayor, Commonalty, and Citizens, and the *Metropolitan Railway. Company*; and it is expedient that the rights of that company under such agreement should be preserved: Therefore nothing in this Act contained shall prejudice or affect the rights of that company under the said agreement, but all the covenants and provisions thereof shall be as applicable to the same lands, if purchased under the powers of this Act, as they would have been if they had been purchased under the powers of the said *Metropolitan Meat & Poultry Market (Western Approach) Act*, 1862."

On the 30th of July, 1864, the Defendants served the Plaintiff with a notice, purporting to be a notice under this last Act, to take the lands previously the subject of controversy; but by this notice they expressly reserved to themselves "their right to take the said premises and every part thereof under the Act of Parliament having the short title of the *Meat and Poultry, &c., Act*, 1862;" adding "that this notice is given without prejudice to the rights of the said Mayor, Aldermen, and Commons, under the said Act, and without prejudice to their rights and claims in a certain suit in Chancery in which you are Plaintiff and they are Defendants."

The Plaintiff alleged that this notice was an abuse of the powers of the Act of 1864, and a correspondence ensued upon the subject, when, as the parties could not come to any agreement, the Plaintiff, on the 14th of October, 1864, filed a second bill in Chancery against the Defendants, in which he alleged that the

notice of the 30th of July, 1864, was a mere device to evade the effect of the former suit; and he prayed for an injunction to prevent the Defendants from taking the lands under this last Act and notice, and from carrying into effect, under colour of this last Act, the intended transfer to the railway company in execution of the agreement of June, 1862, or for any purpose other than that of the execution of the works authorized by the last Act of Parliament; and that it might be declared that this notice was not given in the due exercise of the powers conferred by the said Act. The prayer of the former bill, modified by the final decree thereon, was in substance repeated.

The Defendants put in an answer, which alleged that they desired to take the Plaintiff's lands for the purposes of their several Acts; insisted on the validity of the agreement of June, 1862, and that of the notice of July, 1864; and set forth various reasons for the purpose of shewing that they could not, without taking the lands of the Plaintiff, duly carry into effect the purposes of the Act of 1864. They also stated that they had purchased from the Dean and Chapter of *Ely* the reversion in fee simple of the lands held by the Plaintiff under lease from the Dean and Chapter; and denied that the last notice was a device to evade the effect of the former decree.

On the 19th of January, 1865, the Plaintiff moved before the Master of the Rolls for an injunction to restrain the Defendants from acting on their last notice. This motion was agreed to be treated as a hearing of the cause, and on the 13th of February his Honour made his decree dismissing the bill with costs.(1) The case was taken by appeal before the Lords Justices, who thought that the railway company ought to be made a party to the suit, which having been done, and an answer having been put in, and evidence taken, the cause came on for hearing before their Lordships, and, on the 9th of May, 1865, they made a decree, in substance affirming that of the Master of the Rolls, and ordering the Plaintiff's second bill to be dismissed, but without costs. The main ground of this decree was, that the 37th section of the *Holborn Valley Improvement Act*, 1864, was a Parliamentary recognition of the validity of the agreement of June, 1862.(2)

Mr. *Galloway* appealed against that decree.

(1) Reported 34 Beav. 209: 11 Jur. N.S. 293.
(2) Reported 2 De G. J. & S. 639: 11 Jur. N.S. 474

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Mr. *Rolt*, Q.C., and Mr. *Selwyn*, Q.C. (Mr. *Bagshawe* was with them), for the Appellant:—

When powers are given for the compulsory purchase of lands, they must be exactly followed, and the land must be taken *bonâ fide* for the purposes of the railway: *Stockton and Darlington Company* v. *Brown*. (1) It cannot be said that that was so here. The agreement of June, 1862, shewed a purpose which had not even been contemplated by the Act, and the agreement being made before the Act was passed, was made without any pretence of being made under its authority. It was absolutely void. The principle in the case of the *Stockton and Darlington Railway* v. *Brown*—that the authority to take the land must be exercised *bonâ fide*—was enforced strictly by Vice-Chancellor *Kindersley* in *Flower* v. *The Brighton Railway Company* (2), in which he held that where a company obtained powers to take such lands as were thought necessary for the purposes of the railway, the affidavit of the engineer of the railway that certain land "was or would be wanted for the purposes of the company" was not sufficient, but that the purposes must be specified, so that the Court might judge if the land was *bonâ fide* required. When that had been done, but not till then, the injunction against taking the land was dissolved. Here the purposes were clearly those of the railway company, and not those of the Corporation with the object of effecting the proposed *City* improvements. These objects are very different. The railway company wants the lands with a view to a profitable private speculation; the Respondents only want the lands to use them for purposes of public benefit. In a railway case the extent to which lands may be taken is defined and limited by the gauge and the datum line. There is no such limitation placed by the Legislature upon a public body taking lands for the purpose of making new streets and public improvements, but the unrestricted powers given in one case cannot be claimed for the other: *Webb* v. *The Manchester and Leeds Railway Company* (3). The Legislature never intended that these powers given to a Corporation for executing public improvements should be used for the advantage of mere private speculators. They had been so used here—

(1) 9 H. L. Cas. 246, 6 Jur. N.S. 1168. (2) 2 Drew. & S. 330, 11 Jur. N.S. 406

(3) 4 My. & Cr. 116.

thus, in fact, defeating the restrictions which the Legislature itself had imposed on the taking of land for the purposes of the railway. This agreement of June, 1862, had not been communicated to the Legislature while the bill of 1862 was pending, and that was a fraud on the Legislature.

Sir *H. Cairns*, Q.C. (Mr. *Clement Swanston* was with him), for the Respondents, the Mayor and Commonalty of *London*:—

Nothing has been done here that is not in accordance with the intention of the Legislature as expressed in all the Acts of Parliament relating to the projected improvements in the City of *London*. These Acts must be construed favourably for the Corporation. There is a great distinction between Acts granting compulsory powers to joint stock companies in respect of what are really private speculations, and Acts empowering and requiring corporate bodies, having no private interests to promote, to carry into effect public improvements. In the latter case, in order to avoid taxing the public, there may well be permission granted to the Corporation to take more land than is actually necessary for the purpose of making the specified improvements, and, by a sale of the superfluous land, rendered more valuable by the improvements themselves, to raise funds for the execution of a great public work. Some of these Acts show that the Legislature intended that these Respondents should have such a means of providing for expenses. They were empowered to demise and to sell, and the powers were granted in terms which were utterly inconsistent with the idea of restricting them to the taking of no more land than was necessary for the mere making of the improvements. There was not a clause in any one of their Acts which confined them to a mere defined line of road, nor were they in any way restricted or fettered as to the mode of disposing of the land which, after making the improvements, they should find to be superfluous.

The *Attorney-General* (Sir *R. Palmer*) (Mr. *Jessel*, Q.C., and Mr. *H. F. Bristowe*, were with him) for the Respondents, the directors of the *Metropolitan Railway Company*:—

The agreement was perfectly valid, and no objection exists as

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to its enforcement merely because it was made in anticipation of the Act which directly gave to the Corporation the power of disposing of the superfluous lands: *The Eastern Counties Railway Company* v. *Hawkes* (1). Where everything required by an Act had been done before the compulsory powers given by that Act had expired, but those powers had not been actually enforced, it was still held that they might be put in force: *Sparrow* v. *The Oxford, Worcester and Wolverhampton Railway Company* (2). A different opinion, intimated by Vice-Chancellor *Shadwell*, in *Brocklebank* v. *The Whitehaven Railway Company* (3), was strongly doubted in the same case by Lord *Cottenham*, and was declined to be adopted in the *Queen* v. *The Birmingham and Oxford Junction Railway Company* (4), by the Court of Queen's Bench, and the Exchequer Chamber (5); and as to the purpose for which the land was required, Vice-Chancellor *Turner*, in *Cother* v. *The Midland Railway Company* (6), held, that where a railway company had a right, by the compulsory powers of its Act, to take land for the "railway and works," those powers warranted the taking of land for the building of a railway station, for the general *Railway Act*, considered as incorporated with each special Act, authorized the making of stations as well as the making of the line itself. In such a case it was clear that the words must not be strictly, but ought to be fairly construed. And where what was done was clearly within the objects of the Act, the transaction would not be necessarily void, but might be confirmed: *Foss* v. *Harbottle*. (7) Here that was the case, and, in addition, the 37th section of the *Holborn Valley Act* completely confirmed the rights of the company under the agreement of June, 1862.

Mr. *Rolt* replied.

April 20. THE LORD CHANCELLOR (Lord *Cranworth*):—

4 Ch 526

My Lords, these were two appeals from two decrees made in two suits relating to the same land, and as the two were intimately

(1) 5 H. L. Cas. 331.
(2) 9 Hare, 436.
(3) 15 Sim. 632.
(4) 15 Q. B. 634.
(5) 15 Q. B. 647, n.
(6) 2 Phill. 469.
(7) 2 Hare, 461—492.

connected, both appeals were heard together, and both now stand for judgment.

Mr. *Galloway*, who was the Appellant in both suits, is the owner of lands and buildings, partly freehold and partly leasehold, situate near *Smithfield*, to the north of *West Street*. He has also property to the south of the same street, but as to that he raises no question. [His Lordship here stated the facts of the case, and the course of the proceedings].

The case of the Appellant, Mr. *Galloway*, rested on a principle well recognized, and founded on the soundest principles of justice. The principle is this, that when persons embarking in great undertakings, for the accomplishment of which those engaged in them have received authority from the Legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorized cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the Legislature has invested them with extraordinary powers. The necessity for strictly enforcing this principle became apparent, when it became an ordinary occurrence that associations should be formed of large numbers of persons possessing enormous pecuniary resources, and to whom are given powers of interfering for certain purposes with the rights of private property. In such a state of things it was very important that means should be devised, whereby the Courts, consistently with the ordinary principles on which they act, should be able to keep such associations or companies strictly within their powers, and should prevent them, when the Legislature has given them power to interfere with private property for one purpose, from using that power for another. Lord *Cottenham*, in numerous instances, interfered in such cases; and the principle has been cordially approved of, and acted on, in all the Courts of law and equity, and has been frequently recognized and confirmed in this House. It has become a well-settled head of equity, that any company authorized by the Legislature to take compulsorily the land of another for a definite object, will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from so doing.

Relying on this principle, the Appellant contends that his

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bill in the second suit was wrongfully dismissed, and that he is entitled to the injunction given to him by the decree in the first suit. The question is, whether he has brought himself within the principle on which he relies.

There is little or no difference as to the facts connected with this agreement. On the 26th June, 1862, being rather more than a month before the *Western Approaches Act* received the royal assent, but when it was pending in Parliament, an agreement which had long been in the course of negotiation was finally concluded between the Corporation of the City of *London* and the *Metropolitan Railway Company*, whereby the Respondents engaged, that as soon as possible after the Bill should have become law, they would purchase and procure to be vested in themselves a certain defined portion of the lands which by the intended Act it was proposed they should be authorized to take, and then would sell it to the railway company for the purposes of the railway in consideration of a sum of £70,000.

The land thus agreed to be taken and sold to the railway company included the property of the Appellant; and there is no doubt that it all formed part of what the Respondents were authorized to take for the purposes of the *Western Approaches Act*. The only question is, whether the sale to the railway company can be treated as one of those purposes. And this depends entirely on the true construction of the Act under which the Respondents proceeded.

By the 5th section of the Act, all the powers, provisions, restrictions, and enactments contained in the *London City Improvement Act*, 1847, are to be taken to extend, and to be applied to, the Act now under consideration. This Act of 1847 seems to have been the first of a number of Acts since passed for enabling the Corporation to make improvements in the *Metropolis*. It contains clauses which must be applicable to all metropolitan improvements. It enables the Mayor and Corporation to fix the width of streets and footpaths, to stop up streets and ways, to raise and lower the level of streets, and makes numerous other provisions of a general character. All these are thus adopted into the Act now in question; and, as appears, into many other Acts; and the Act of 1847 has thus acquired the name of the *Model Act*.

By section 13 of that Act the Mayor and Corporation are empowered to take any house or land which they might deem it expedient to take for the purposes of the Act. Provided always, that without the consent of the owner they cannot take any lands not included in the schedule to the Act. Provision is made in subsequent clauses for the mode of ascertaining the value of the property taken, and for compensating the owners for the same.

4 Ex 305
7 Eq 527

Now, it must be observed that the Legislature, in providing for such an object as that of widening and improving the streets of the *Metropolis*, has to deal with a subject totally different from that of enabling a body of adventurers to form a railway. In that latter case, the persons seeking the aid of Parliament are bound to shew that what they are proposing to do is of such public importance as to make it reasonable that they should be enabled so far to interfere with the rights of private property as to compel the owners of the land required for the railway to sell it to them at a fair price. The Legislature has no concern with the question as to how the persons embarking in the undertaking are to obtain funds to pay for the construction of the railway. The railway will become the property of the speculators, and will itself repay them (at all events, it is anticipated that it will repay them) by the tolls levied on it, the outlay they have made. But in the case of a public body, like the Mayor and Corporation of the City of *London*, undertaking improvements in the *Metropolis*, the matter is very different. When they have made a new or widened an old street, they will necessarily have incurred a very great expense for which they can get no return. The new or improved street is dedicated to the public, and, unlike the railway, yields no profit to those by whom it has been made. In order to meet this difficulty, and to enable corporations to reimburse themselves, the course has been to authorize them to take compulsorily, not only the buildings actually necessary for forming the streets or other projected improvements, but also other neighbouring lands and buildings, the value of which, and the proper mode of dealing with which, the Legislature considers to be connected with and dependent upon the projected improvements. In the *Model Act* all the lands and buildings authorized to be taken compulsorily are enumerated or referred to in a schedule to the Act. In later

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Acts the practice has been to have them all described in a book called the book of reference, deposited with the clerk of the peace, accompanied by a map or ground plan.

By the 13th section of the *Model Act*, the Mayor and Commonalty were empowered to take, for the purposes of that Act, all the lands and buildings comprised in the schedule, and the mode in which they were required to deal with any land taken and not actually laid into a street, is indicated in the 46th clause; and it is this: they were bound to let it on building leases to persons who would agree to erect houses or other buildings on plans to be previously approved by themselves, and they were afterwards empowered to sell the ground rents and the reversion expectant on the leases. The object of all this is plain. It was anticipated that the projected improvements would be likely so to add to the value of property in the neighbourhood, that by enabling those at whose cost the improvements had been made to appropriate to themselves, at their old value, the houses and lands adjoining the improvements, and then to sell them at their increased value, they might be able wholly or partially to reimburse themselves the outlay they had made.

The 46th section declares, in express terms, that all lands demised and leased by the Corporation, under the powers of the Act, shall be deemed to be land required for the purposes of the Act.

Such being the clauses of the *Model Act*, all of which are incorporated into the Act with which we have now to deal (I mean the *Western Approaches Act*), it seems hardly necessary that I should say more than that the observations I have made on the *Model Act* satisfy me that under the *Western Approaches Act* the Respondents were empowered to take compulsorily all the lands included in the book of reference, which comprise those of the Appellant, Mr. *Galloway*, and to sell them at the best price they would fetch. It is however right to add, that I think the same conclusion would follow from a fair consideration of the *Western Approaches Act* itself, bearing in mind only the general observations I have made as to the object which in all these *Metropolitan Improvement Acts* the Legislature must have had in view.

In the year 1860 the Corporation had been empowered to make a new meat market on the site, or mainly on the site, of the old

Smithfield Market. In the year 1862 the Act now in question was passed, its object being to give a better approach to the new market from the west.

By the 7th section of that Act, the Respondents are empowered to make a street north of the intended new market in a westerly direction, up to *Victoria Street*, according to a plan deposited with the clerk of the peace. The 8th section then states that the book of reference, containing a description of the property which might be required for the purposes of the Act, and which was deposited with the clerk of the peace, should at all times be open to public inspection.

Now, pausing here, it is plain that the Respondents were by this Act, and by the *Model Act*, and by the clauses of the *Lands Clauses Act* incorporated with it, empowered to take compulsorily, for the purposes of the Act, all or any of the houses and lands contained in the book of reference. One object of the Act, and that the main object, evidently was that stated in section 7, the forming of the new street.

But I think that, even independently of the *Model Act*, there are farther objects indicated in subsequent clauses. By the 16th, the Respondents are authorized to borrow on the credit of the tolls of the new market, and of the other property of the Corporation, a sum of £70,000, and also to borrow on the credit of the Corporation estates and of the lands by the Act authorized to be purchased or acquired, a farther sum of £115,000.

By section 18 it is provided that these two sums of £70,000 and £115,000 shall be applied in discharge of the expense of making the new street, and of otherwise carrying the purposes of the Act into full effect; and that the £115,000 shall within seven years be paid off by a sale of the superfluous lands, or otherwise out of the other property of the Corporation. The expression is, the "said" superfluous lands, but as no mention had been previously made in the Act of superfluous lands, I think the word "said" must be treated as having crept in *per incuriam*.

The next section (the 19th) enacts that if at the end of five years the whole of the money expended in purchasing the necessary land for forming the street, or in relation thereto, shall be less than the £70,000 borrowed under section 16, and charged on

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(*inter alia*) the tolls, then the excess shall be applied in paying off or reducing the amount of the sum so charged on the tolls. But the clause expressly provides that in calculating the amount of the sums expended, there must be deducted the net amount of all money produced by sale of such of the said lands as should not have been thrown into the street, and the value of such of them as should not have been sold. This shews plainly that the Respondents were to have the power of selling and appropriating the whole of the said lands, *i. e.* the lands authorized to be purchased and not actually made to form part of the new street; and the only question is, what lands are so authorized to be taken? Even independently of the *Model Act* I can discover no limit except that imposed by the book of reference and by the consent of the owner in the case of land taken under the 9th section.

The Appellant contends that the true limit is to be discovered by ascertaining what lands are necessary for enabling suitable houses or buildings to be erected along the sides of the new street, with a reasonable depth behind.

This seems to me an arbitrary and fanciful limitation, not justified by anything to be found in the Act, and to be altogether inconsistent with the book of reference, and the map or plan annexed to it. It is impossible, looking at that plan, to believe that all the houses and plots of land marked on it were only to be taken in order to afford space behind houses or shops to be built in the line of the new street. A mere inspection of the map is sufficient to negative any hypothesis of that kind.

4 Ex. 305

The intention of the Legislature, as deducible from the Act, appears to me to have been that the Respondents were to be at liberty to purchase compulsorily all the lands included in the book of reference. They were then to appropriate to the line of the street whatever was necessary properly to form the street. The expense of all which was wanted for the street, or was expended in paving or making it, was made a charge on the tolls. But the Respondents were to be at liberty to sell all which was not included in the line of the street, so as thereby, if any profit was realised on re-sales, to discharge or reduce the sum charged on the tolls. The Legislature trusted the Respondents to deal with the whole property in the manner which should be considered

most conducive to the public interest, in forming the new street with as little cost as possible to the frequenters of the new market.

This view of the case is confirmed by the 20th section. In the *Model Act* it was provided that no lands taken by the Corporation and not actually converted into streets should be disposed of otherwise than by causing houses to be built on the line of the streets authorized to be formed. That might have been very reasonable, having regard to the nature of the improvement thereby authorized. We have no copy of the schedule annexed to that Act, or of the map showing the extent and nature of the buildings thereby authorized to be taken. Probably they were all buildings abutting on or near to the new streets thereby authorized to be made, and then it might be a reasonable thing to impose on the Corporation the duty of demising the land not wanted for the street itself, on building leases, to persons willing to erect such buildings as the Corporation might approve. At all events, with regard to the locality of the improvements contemplated by that Act, the Legislature thought fit to take that precaution. The Mayor and Corporation were bound, first, to demise on building leases, and then, after the buildings had been completed, they were authorized to sell the leases and the ground rents. But the Legislature did not think that any such precaution was necessary with reference to the improvements contemplated by the Act now under consideration; for, by the 20th section, the Respondents are expressly empowered either to demise on building leases, and then to sell the leases and ground rents according to the powers given by the *Model Act*, or at once to sell the land taken without any restriction as to the use it might be put to. The object was to effect a great public improvement, and to enable the Respondents to raise funds for the purpose of carrying it into execution. It does not seem to me to be unreasonable to suppose that the Legislature left it to the Respondents to judge of the best means of carrying into effect the duties entrusted to them.

The only question, therefore, on the first decree, is that depending on the agreement entered into by the Respondents before they had obtained their Act to sell a portion of the lands to be included in the book of reference to the railway company at a stipulated price.

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I cannot, however, attribute any force to the objection raised on this head, even independently of the subsequent recognition of the agreement by the Legislature in the *Holborn Valley Act.*

It was argued that the existence of this agreement was not disclosed to Parliament when the *Western Approaches Act* was passed, and that not to disclose it was a species of fraud on the Legislature. But it was, if I rightly construe the Act, certainly known that one of its objects was to enable the Respondents to sell any of the lands included in the book of reference, and not wanted for the actual line of the street, so as to enable them to raise money and get rid of it, or, at all events, lower the tolls of the market. That being so, I see no reason why the Respondents were bound to disclose any agreement they had made with the railway company. The suggestion made in the bill, that they were selling at an undervalue in consequence of their being themselves interested in the railway, rested on no foundation, and in fact no reliance was placed on it in argument. The railway company was likely to be their best customer. Their negotiations with the company were notorious; and it was probably the most prudent thing they could do to bind the company to become the purchaser, at what, no doubt, they considered the best price they could obtain.

On these grounds I have come to the conclusion that the bill in the first suit, being that to which the second appeal relates, ought to have been dismissed, and so that the decree of the 28th of July, 1864, ought to be reversed.

It is unnecessary for me to say much on the other suit, *i.e.*, that in which Mr. *Galloway* is Appellant, complaining of the decree of the Lords Justices of the 9th of May, 1865, dismissing the bill filed in the second suit. In that case the Corporation proceeded to take the lands of Mr. *Galloway* under the subsequent Act passed in 1864, called the *Holborn Valley Improvement Act.* Mr. *Galloway's* lands were included in the book of reference referred to in that Act, and the same arguments as to the right of the Respondent to take them, which satisfied me as regarded the *Western Approaches Act*, are also applicable to the *Holborn Valley Improvement Act.* But there is this circumstance in addition: in that Act the agreement between the Corporation and the *Metropolitan Railway Company* is expressly referred to.

The 37th section is in these words:—His Lordship read it (see *ante*).

Both the Master of the Rolls and Lord Justice *Knight Bruce* attributed great importance to that section. They both treated it as showing that the existence of the agreement was known to the Legislature, and that it was not considered as occasioning any obstacle to the Respondents in the way of purchasing the lands which by the last Act they were authorized to purchase. I own I should not have wanted this confirmation of the view I have taken; but it is right that I should advert to it, as a matter which seemed important to those very learned persons.

I say nothing as to the point raised in reference to the invalidity of the notices. If they are invalid, Mr. *Galloway* may raise his legal objection; but he is not on that account entitled to any equitable relief by injunction.

The result of my opinion is, that the first bill ought to have been dismissed with costs; and so that the second appeal ought to be allowed. The first appeal must be dismissed with costs.

LORD CHELMSFORD (after fully stating the facts):—

My Lords. In these two appeals which have been heard together at your Lordship's bar, the principal question is whether the Corporation of *London*, under the provisions of the *Metropolitan Meat and Poultry Market* (*Western Approach*) *Act*, 1862, or of the *Holborn Valley Improvement Act*, 1864, can take compulsorily certain land of Mr. *Richard Hodgson Galloway* for the purposes of these Acts.

The proceedings to obtain possession of the land in question were resisted by Mr. *Galloway* on the ground that before the passing of the *Metropolitan Meat and Poultry* (*Western Approach*) *Act*, 1862, the Respondents had entered into an agreement to sell and convey to the *Metropolitan Railway Company* a considerable portion of this land; and that they were, therefore, using their compulsory powers, not for the purposes of the Acts, but to enable them to carry out their agreement with the railway company.

A preliminary objection to the proceedings of the Respondents was made, but not much insisted upon, namely, that even supposing them entitled to compel the Appellant to part with his lands, the

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provisions of the *London City Improvement Act*, 1847, were not observed, as there was no offer on the part of the Corporation to treat with him, nor any offer of a price. It is quite clear that there is nothing in this objection. The notice by the Respondents was exactly in the words of the 13th section of this Act, that "they meant to take and use the Appellant's hereditaments and premises." After receiving this notice, he made a claim of £65,000, which the Respondents would not give, but offered a reference, which he declined. Mr. *Galloway* and the Respondents, therefore, could not agree, and they were empowered, by the express words of the 21st section of the Act, to issue the precept to summon a jury to assess the amount of compensation to be paid to him.

The substantial objection, however, is one that goes to the very root of the proceedings of the Respondents, and denies altogether their right to compel Mr. *Galloway* to part with his lands to them. It is contended on his behalf that by entering into the agreement with the *Metropolitan Railway Company* to sell the land before the Act had been obtained empowering the Respondents to purchase it, they had disabled themselves from exercising a proper judgment as to how much would be required for the purposes of the Act, and were using their compulsory powers, not to obtain land which was wanted to carry out their purposes, but to enable them to complete the agreement by which they were bound immediately afterwards to convey to the railway company a part of the land thus obtained.

Upon this point a different view was taken by Vice-Chancellor *Wood*, and apparently by both the Lords Justices, but certainly by Lord Justice *Knight Bruce*. The Vice-Chancellor considered that the Respondents had not so fettered themselves by the agreement as to prevent their exercising a right as to Mr. *Galloway's* land being wanted for the purposes of the improvement. And that they had adopted a reasonable and proper course in ascertaining beforehand whether there were persons willing to purchase and to give them proper prices, so as to enable them to calculate the risk in the expenditure they were about to incur. The Lord Justice *Knight Bruce*, on the contrary, thought that the agreement must be taken to have, in effect, incapacitated the Respondents from forming a just judgment, as between them and Mr. *Galloway*, concerning the quantity of land which they should

require him to sell to them under their parliamentary powers. The Lord Justice *Turner*, upon this question, said: "The Respondents have agreed to sell to the railway company before they purchased, and even before they acquired the power to purchase; can it then be said that they have exercised the judgment which they were bound to exercise, or even that they have ever been in a position to exercise that judgment, bound as they have been and are by the agreement into which they have entered? I cannot, to say the least, but feel doubts upon these points, and think that they ought to be reserved to the hearing." His Lordship, however, in a previous part of his judgment, had put the point of the agreement entirely upon the incapacity of the railway company to purchase from the Respondents. His conclusion in this respect he admitted in the second suit to have been to some extent founded in error as to one of the facts of the case. There can be no doubt that at the time of the agreement the *Metropolitan Railway Company* was not incapacitated from purchasing. The compulsory powers of purchase had not expired; and being empowered under the Act to take any quantity of land not exceeding twenty acres for extraordinary purposes, the company had not nearly exhausted this power. If these facts had been present to the mind of the Lord Justice it is possible, from his observations, that he might not have held that the existence of the agreement could have been successfully urged against the right of the Corporation to take the land in question. For his language was this: "The Defendants have, under the *Metropolitan Meat and Poultry Market* (*Western Approach*) *Act*, 1862, the right to purchase the whole of the Plaintiff's property; and they must also, as it seems to me, have the right to sell the property when purchased or acquired by them to some persons and under some circumstances. The 20th section of the last-mentioned Act must, I think, be held to give them this power. But then, what is the extent of this power? A power to sell, even though given by Parliament, cannot, as I apprehend, be construed to authorize an incapacitated person to buy; and unless, therefore, it can be shewn, not merely that the Respondents were empowered to sell, but also that the railway company was empowered to buy, I cannot at present see my way to holding that the Respondents could sell to the railway com-

W. Lee 10 Jur. N.S. 554

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pany. But yet it is clear, upon the evidence before us, that it is for the purpose, and sole purpose, of selling to the railway company, that the Respondents are endeavouring to purchase the whole of the Plaintiff's property."

The Lord Justice here seems not to proceed upon the ground of the agreement fettering the judgment of the Corporation, but upon its being entered into with an incapacitated company. But even supposing the railway company had no capacity to purchase of the Respondents, if they had power to take the land, I cannot see, with great respect to the Lord Justice, what difference it could make to Mr. *Galloway* how they disposed of it afterwards, or whether the intended purchaser was capable of purchasing or not. The real question is, whether the Respondents having (to use the words of Lord Justice *Turner*) "the right to purchase the whole of Mr. *Galloway's* property, and to sell it again when purchased or acquired," they had, by the arrangement, which they had entered into beforehand, to sell a portion of it to the railway company, prevented all future exercise of their compulsory powers over it.

In order rightly to determine this question, it is necessary to ascertain the extent of the powers conferred upon the Respondents by the *Metropolitan Meat and Poultry* (*Western Approach*) *Act*, 1862.

I am not quite satisfied of the correctness of Vice-Chancellor *Wood's* opinion, that one of the purposes of the Act was to enable the Respondents to raise money by purchasing land, no part of which was wanted for the formation of the intended street, and selling it again. But looking at the deposited plans and book of reference, it is plain that the Act conferred upon the Respondents a much more extensive power over property in the neighbourhood of the proposed line of street than could possibly be required for the immediate purposes of the street itself. By the 16th section also of the Act, the Respondents are empowered to charge upon, and borrow, and raise on the credit of, the estates and other property of the Corporation, and the lands by this Act authorized to be purchased or acquired, the sum of £115,000. The charge of this sum of £115,000 is to be laid, not upon the lands "required for the purposes of the Act," but upon "the lands by this Act authorized to be purchased or acquired," which extends in terms

(1) See 10 Jur. N.S. 553.

to all the lands in the deposited plans and book of reference. The sum so raised is, by the 18th section of the Act, to be paid off "within seven years after the passing of the Act, out of the proceeds of the sale of the said superfluous lands," or otherwise by the Respondents out of their estates and other property. The word "said" has no antecedent to which it can properly be referred; but the "superfluous lands" must mean those which under the 16th section "being authorized to be purchased or acquired," are not wanted for the purposes of the Act. Therefore it appears that the Respondents were empowered, before commencing their operations, to borrow money on the credit of all or any of the lands authorized by the Act to be purchased, for the purpose of enabling them to begin the formation of the intended new street. And all the lands charged with the repayment of the money borrowed, which afterwards might not be wanted for the purposes of the street, would become superfluous lands, which might be sold, under the 18th section of the Act, to pay off the debts. That the Legislature contemplated that there would be a considerable amount of superfluous lands appears from the provision in this section, that the large sum of £115,000 was to be discharged out of the proceeds of these sales (amongst other sources) within seven years. All this goes far to justify the view taken by Vice-Chancellor *Wood*, not perhaps that the Respondents could purchase land merely for the purpose of selling it again, but that they might charge all the lands which they had power to take, and so bring them afterwards into the category of superfluous lands, to be sold to pay off the charge, which amounts nearly to the same thing.

But confining our attention to Mr. *Galloway's* lands, the power conferred by the Act upon the Respondents to take them is unquestionable. The expressed purpose of the Act is the formation of a new western approach to the *Metropolitan Meat and Poultry Market* by means of a street in continuation of the intended street on the north side of the market, to *Victoria Street*. The word "street" does not mean the mere roadway, but (as correctly defined by Mr. *Rolt* in his argument) "a thoroughfare with houses on both sides." Therefore, when the Legislature empowered the Mayor and Corporation to take

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lands, houses, and buildings, for the purposes of the Act, it did not confine them to the mere width of the intended road, but gave them authority to take as much land as might be necessary for the formation of the street itself, by the erection of houses or other buildings on each side. There can be no doubt that a part and a considerable part, of Mr. *Galloway's* land on the north side of *West Street*, would have been required to form a portion of the proposed new street, and that the Respondents might have insisted upon taking the whole, and might afterwards have sold as superfluous all that was not laid into the street. It is difficult to understand why, if they might have done all this under the Act when passed, they might not have anticipated its passing, and made a conditional agreement, binding themselves to deal with the property to be acquired under the Act in a similar manner.

It was strongly urged, on the part of Mr. *Galloway*, that, under the circumstances, his land could not be said to be taken for the purposes of the Act, and the case of *Flower* v. *The Brighton Railway Company* (1), was cited to show that it was not sufficient for the Respondents to say that they wanted the land for "the purposes of the Act," but that they ought to specify the particular purpose for which it was required. I do not quite see how that case applies. That was an application for an injunction to restrain the company from proceeding upon a notice to treat for certain land of the Plaintiff, the company having previously given him two notices, which were afterwards withdrawn, in which the piece of land in question was not included. In the affidavits filed by the Appellant it was stated that this piece of land was not wanted for the line of railway. The engineer of the company swore that it would be "required for the purposes of the Act, and for the railway and works authorized by the Act." Vice-Chancellor *Kindersley* said: "The question is, whether the railway company has a right to take any lands, or houses, or premises of any kind whatever, simply because the engineer makes an affidavit that they are or will be required for the purposes of the Act, without saying what those purposes are. If that be the law, it is hard to conceive a law more likely to be detrimental to the interests of the public."

(1) 2 Dr. & Sm. 330; 11 Jur. N. S. 406.

Now, if the Respondents here, upon Mr. *Galloway's* application for an injunction, had not condescended upon any explanation, but had merely stated that they wanted his land for the purposes of the Act, the case cited would have been applicable. But both in their affidavits filed before the motion, and in their answer afterwards, they fully explained the grounds upon which they considered themselves authorized to take Mr. *Galloway's* land. There is no imputation upon the Respondents of want of *bonâ fides*. They have never concealed their agreement with the railway company, nor denied that a portion of Mr. *Galloway's* land on the north side of *West Street* is required to enable them to carry out this agreement. It is a mere question of disputed right, the Respondents claiming under all the circumstances to be entitled to take Mr. *Galloway's* land, and he insisting that in the position in which they are placed by the agreement with the railway company, they are debarred from exercising their parliamentary powers over his land.

This is substantially the only point to be determined between the parties. After carefully considering the arguments of counsel, and the opinions of the learned Judges in the Courts below upon the subject, I cannot bring my mind to the conclusion that parties who are promoting a bill by which they seek to obtain certain discretionary powers over property may not enter into a conditional agreement that, in the event of the bill passing into a law, they will dispose of the property to be acquired in a particular way, without, by this anticipation of the actual possession of the powers, depriving themselves of all discretion to exercise them when obtained. If, as seems to be admitted, the Respondents might have dealt with Mr. *Galloway's* land after the passing of the *Metropolitan Meat and Poultry Market (Western Approach) Act*, 1862, exactly as they are now bound to do by their agreement with the railway company, why were they not quite as capable of forming a judgment as to the best mode of carrying out the purposes of the Act before it passed as they would have been afterwards?—and how, therefore, can it be properly said that the agreement with the railway company "incapacitated the Respondents from forming a just judgment?"

I am unable also to discover what prejudice Mr. *Galloway* has

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sustained from this agreement. It must be borne in mind that at the time it was entered into, the *Metropolitan Railway Company* was enabled under its own Act to purchase the whole of his land on the north side of *West Street*. This compulsory power indeed was to expire shortly afterwards; but the company might have preserved its right to exercise it by giving Mr. *Galloway* notice of the intention to take and use his land. What possible difference could it make to him whether he was to receive his compensation from the Respondents or from the railway company? And how was he prejudiced by the arrangement that the railway company should allow its powers to lapse, and should buy from the Respondents so much of the land on the north side of *West Street* as was not required for the road after the Respondents should have obtained possession of it from Mr. *Galloway* under the provisions of their own Act.

Upon a careful consideration of the circumstances of the case, I think that the decree for an injunction in the first suit was wrong, and that it ought to be reversed.

A very few observations will dispose of the second suit. While the first suit was pending, another Act called the *Holborn Valley Improvement Act*, 1864, was obtained by the Respondents, and received the royal assent on the 23rd of June, 1864. Under this Act power was given to the Corporation to take the same lands of Mr. *Galloway* as were included in the *Metropolitan Meat and Poultry Market* (*Western Approach*) *Act*, 1862. Shortly after the passing of the *Holborn Valley Improvement Act*, and two days after the decree for an injunction in the first suit, viz., on the 30th of July, 1864, the Respondents served Mr. *Galloway* with a notice of their intention to take the whole of his property in the deposited plans and books of reference, under that Act. And at the same time, by a letter from their comptroller, they reserved their right to take the property under the Act of 1862. Mr. *Galloway* thereupon filed a bill for an injunction to restrain the Respondents from taking any part of his property, except so much as they should *bonâ fide* require for the purposes of the *Holborn Valley* Improvement. The case was heard on motion for a decree, by the Master of the Rolls, who dismissed the Bill with costs. Upon appeal to the Lords Justices they differed in opinion; but Lord

(1) See 34 Beav. 203: 11 Jur. N.S. 198.

Justice *Knight Bruce* agreeing with the Master of the Rolls, the appeal was dismissed.

The judgment of the Master of the Rolls proceeded partly, and that of Lord Justice *Knight Bruce* entirely, on the effect of the 37th section of the *Holborn Valley Improvement Act*, which they thought gave validity to the agreement entered into between the Corporation and the railway company. That section, after reciting that this agreement had been entered into, and that it was expedient that the rights of the *Metropolitan Railway Company* under it should be preserved, enacted as follows. [His Lordship read it.—See *ante*.]

The Master of the Rolls was of opinion, and Lord Justice *Knight Bruce* agreed with him, that by this section "The Legislature pronounced an opinion equivalent to a declaratory enactment determining that the agreement was a valid agreement, conferring rights upon the *Metropolitan Railway Company* prior to the passing of the Act." Lord Justice *Turner* was unable to agree in the construction put upon this 37th section, but (which is much to be regretted) gave no reason for his hesitation to adopt it. I feel the same inability to construe the enactment in the sense attributed to it by the other learned Judges. I think that all it effected was to recognise the existence of the agreement without declaring anything as to its validity. But the words, "all the covenants and provisions of the agreement shall be as applicable to the lands, if purchased under the powers of this Act, as they would have been if purchased under the powers of the Act of 1862," will be found to have an important significance. If the agreement had been invalid these words would not have given it validity; but it has been shewn, in the examination of the proceedings of the Respondents under the Act of 1862, that the agreement was perfectly valid and binding. If, then, the Respondents might have conveyed to the railway company the lands when acquired under that Act, though taken for that very purpose, they are placed in the same situation with respect to these same lands if purchased under the *Holborn Valley Improvement Act*.

The Master of the Rolls, in his judgment, speaking of the *Holborn Valley Improvement Act*, said: "The first thing I have to

(1) See 11 Jur. N.S. 295.

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observe is, that the object of this Act, which was to make the improvements there specified, which are set out in the second section of the Act, gives for that object, by means of the incorporation of the *City Improvement Act*, 1847, not merely the power to make the improvement in question, but also the power of taking and reselling lands not absolutely required for the streets and viaduct there mentioned, but also for the purpose of raising money to defray part of the expenses required for the purpose, in like manner as if the Act comprised lands which could by no possibility lie in the line of any improvement contemplated by the Act itself, and which therefore could only have been inserted for the purpose of enabling the Corporation to raise the funds in question for the purpose of the Act." With great submission, this passage of the Master of the Roll's judgment appears to me not to be strictly accurate. Under the *Holborn Valley Improvement Act* there is no power expressly given to resell lands not required for the purposes of the Act. And the *London City Improvement Act*, 1847, incorporated with that Act, did not enable the Respondents to take lands for the mere purpose of reselling them in order to raise funds for the improvements to be effected. If any lands purchased and cleared by virtue of the Act were not laid into nor formed part of the streets, the 46th section provided for the manner in which they were to be disposed of, viz. by letting such lands on building leases, the Respondents being empowered, by the 47th section, afterwards to sell the ground rents and reversion of these lands. If then the Respondents were compelled to rely upon the *City Improvement Act*, 1847, and on the *Holborn Valley Improvement Act*, without the 37th section, as by their agreement with the railway company they had disabled themselves from disposing of Mr. *Galloway's* lands not required for the improvement in the only way prescribed by the Acts, they might in my opinion have been restrained in the exercise of their compulsory powers over his property. But under the *Metropolitan Meat and Poultry Market* (*Western Approach*) *Act*, 1862, very extensive powers being given to the Respondents to acquire all the property specified in the plans and book of reference, to raise money upon the credit of it, and to sell superfluous lands to pay off the debt, the Respondents were not restricted by the Act from absolutely disposing of

(y) See 11 Jur. N.S. 994

Mr. *Galloway's* land to the railway company. It has been shewn that there is no objection to the agreement with the railway company on the ground that it preceded the Act by which the powers necessary to its performance were conferred upon the Respondents When therefore the Legislature, by the 37th section of the *Holborn Valley Improvement Act*, made the covenants and provisions of the agreement as applicable to the lands if purchased under the powers of that Act as they would have been if they had been purchased under the powers of the *Metropolitan Meat and Poultry Market (Western Approach) Act*, 1862, it necessarily sanctioned the compulsory purchase by the Respondents of Mr. *Galloway's* land on the north side of *West Street*, and the conveyance of it to the railway company under the *Holborn Valley Improvement Act*. Otherwise the covenants and provisions of the agreement would not have been as applicable to the acquisition of the land under the powers of this Act, as if it had been purchased under the powers of the Act of 1862.

I am therefore of opinion that Mr. *Galloway* could not restrain the Respondents from proceeding to acquire possession of his land under the *Holborn Valley Improvement Act*, and that his bill filed for that purpose was properly dismissed.

The result, therefore, will be that Mr. *Galloway's* appeal will be dismissed with costs, and in the case of the appeal of the Corporation, that the decree must be reversed.

LORD KINGSDOWN:—

My Lords, I entirely agree in the conclusion at which your Lordships have arrived. I should be inclined myself to attribute more weight than my noble and learned friend who has last addressed the House has done, to that clause in the last Act of Parliament which refers to this agreement, not that I consider it to be at all doubtful whether it is a valid agreement. As to the validity of the agreement there never was nor could be any doubt. It was binding on the Mayor and Corporation; it was binding on the railway company; and it was on the ground that it was so binding that Mr. *Galloway* rested his objection. He said you cannot buy this land for your purposes of *City* improvement because you have already by a valid contract engaged to sell it to other persons for making

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a railway, and therefore, in truth, you are not buying for yourselves but you are buying for the railway company, and that you have no right to do. In this I think he was in error. The effect of the recognition of the agreement by Parliament I take to have been this. The Master of the Rolls took this view of it, and I am very much inclined to think (if it is necessary to enter into that) that the view which he took on that subject was correct, namely, *Galloway* had contended and the Court of Chancery had said, that agreement being a valid agreement it constitutes an obstacle to the right of the Mayor and Corporation to purchase. But the Legislature has provided for that. Having full notice of this agreement (which therefore cannot be considered as a fraud on Parliament) the Legislature has declared "under whichever Act you purchase, the agreement shall be carried into effect." It does seem to me, therefore, if it is necessary to rely on that ground, that there is great force in those observations.

What I would suggest, in addition to what has been proposed by the Lord Chancellor, is this. I confess I think that the second bill was more groundless than the first, and I think therefore that that second bill ought, as the first bill was dismissed with costs, to have been likewise dismissed with, instead of being dismissed without, costs. Therefore, I should humbly suggest to your Lordships that the decree in that suit should be affirmed with this variation, that the bill should be dismissed with costs instead of without costs, and that the appeal should be dismissed with costs.

The following Orders were afterwards entered on the journals:—

Galloway v. *The Mayor, &c., of London, et al*:

Ordered that the decree of the Lords Justices of the 9th of May, 1865, be affirmed, with this variation, viz. that the Plaintiff's bill in the proceedings mentioned, ought to have been dismissed out of the Court below, with costs to be paid by the said Plaintiff, instead of without costs: and that the appeal be dismissed: and that the Appellant do pay to the said Respondents the costs incurred in respect of the said appeal, and that the cause be remitted back to the Court of Chancery, to do therein as shall be just, and consistent with this judgment.

The Mayor, &c. of London v. *Galloway*:

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Ordered that the decree of the Court of Chancery, of the 28th of July, 1864, be reversed: and it is hereby declared, that the Plaintiff's bill, in the proceedings mentioned, ought to have been dismissed out of the Court below, with costs to be paid by the Plaintiff: and it is ordered that the cause be remitted back to the Court of Chancery to do therein as shall be just, and consistent with this declaration and this judgment.

Solicitors for Mr. *Galloway*: *Van Sandau, Cumming, & Sons.*

Solicitors for the Respondents, the Mayor and Corporation of *London*: *T. J. Nelson.*

Solicitors for the Respondents, the Directors of the *Metropolitan Railway*: *Burchells.*

EBENEZER W. FERNIE AND OTHERS . . . APPELLANTS;

AND

JAMES YOUNG AND OTHERS . . . . . RESPONDENTS.

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April 19, 20, 23, & 24.

Practice—Trial in Chancery with or without a Jury—Motion for new Trial—Findings—Decree—Appeal—21 & 22 *Vict. c.* 27—25 & 26 *Vict. c.* 42—*Issues not to be directed out of Chancery.*

Upon an appeal against a decree the House can only look to the decree itself, and to what is stated and referred to in the decree, and not to any extrinsic matter.

If, therefore, a decree is founded upon the finding of issues, however those issues were found, whether on a trial at law or on a trial in the Court of Chancery, with or without a jury, and the decree states the findings, but does not refer to the evidence, the House, on an appeal against that decree, cannot look at the evidence to see whether it afforded ground for the findings or the decree.

In a case, therefore, where there had been an application to the Court of Chancery for an injunction to restrain the infringement of a patent, and a trial had taken place before a Vice-Chancellor without a jury, and his Honour had made certain findings, and in the decree on the hearing had made no reference to anything but the findings, the patent, the specification, and the answers, and there was an appeal against the decree alone, it was held that the House had no power to look into the evidence in order to satisfy itself whether the decree was or was not warranted by the evidence, but was bound to confine itself to the decree and to the matters referred to in it.

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On the application for the injunction a trial was, by the Lord Chancellor, ordered to take place by a jury before a Vice-Chancellor. On a consent between the parties the Vice-Chancellor substituted a trial before himself without a jury. This was *ultra vires* of the Vice-Chancellor; the change could only be competently effected by an order of the Lord Chancellor.

Quære, whether when such a change is effected by the consent of parties an appeal will lie.

The Vice-Chancellor fixed the same day for the trial of the questions of fact and for the hearing of the cause; *Semble:* this was an irregularity.

In reality the questions of fact and the hearing of the cause did, by the consent of the parties, for the purposes of general convenience, take place at the same time, but the findings on the issues were entered on one day, and the decree, which was founded on them, appeared to be made on the hearing of the cause, and was dated some days afterwards. This mode of proceeding did not enable the parties, upon an appeal against the decree, to open the whole matter as upon a motion for a new trial, and no such motion having been made in the Court below this House refused to treat the appeal as one which brought the evidence and findings under its notice for review.

The principles and practice of Courts of Equity under the *Chancery Amendment Act* of 1858, and the *Chancery Regulation Act* of 1862, stated and explained.

Where relief is sought in the Court of Chancery, the title to which may be dependent on a legal right, the preliminary trial as to the legal right "shall" (under the Act of 1862) be decided by the Court itself. No issue, therefore, can be directed.

If one party enrols a decree before the time for a new trial expires, the other party is not thereby prevented from moving for a new trial.

ON the 17th October, 1850, the Respondents took out a patent for the manufacture of paraffine oil. The title of the patent was for "Improvements in the treatment of bituminous mineral substances, and in obtaining products therefrom." On the 8th September, 1862, the Respondents filed their bill (which was afterwards amended) against the Appellants, charging them with an infringement of their patent. The bill alleged the novelty of the invention, the sufficiency of the specification, and the validity of the patent, and prayed for an injunction to restrain the infringement thereof, and for an account, and for farther relief. The Appellants put in an answer which denied the validity of the patent on the grounds of want of novelty, and the insufficiency of the specification. In Nov. 1862, a motion was made before Vice-Chancellor *Stuart* for an injunction, but it was ordered to stand over till the hearing of the cause, and he directed an issue on the validity of the patent to be tried at law. This order was taken by appeal before Lord Chan-

cellor *Westbury*, who on the 31st December, 1863 (1), made an order that the cause should be tried by a jury before Vice-Chancellor *Stuart*, on the following questions: "First, was the Respondent, *James Young*, the true and first inventor? Second, was the invention new at the date of the letters patent? Third, did the specification particularly describe and ascertain the nature of the invention, and in what manner the same was to be performed? Fourth, had the Appellants wrongfully used the invention?" On the 15th January, 1864, the Vice-Chancellor, by consent of the parties to the suit, made an order that the said questions should be tried by himself without a jury, and that the cause should be set down for hearing at the same time. The cause was accordingly tried before His Honour, without a jury, in February, 1864. The trial lasted many days. On the 26th May, 1864, he delivered his findings on all the four questions in favour of the Respondents. The cause was ordered to stand for judgment on 1st June, 1864. On that day he made a decree, which recited the trial and the findings, then set forth the hearing and declared the order of the Court, granting a perpetual injunction against the Appellants. That decree was enrolled by the Appellants on the 18th June, 1864, for the purpose of bringing it up to this House by appeal, but they did not make at any time any motion before the Vice-Chancellor, or before the Court of Appeal, for a new trial on the findings. The Respondents insisted in the first instance that the appeal was not maintainable because the Appellants had not, according to the provisions of the new Chancery Jurisdiction Statutes (2), made any application for a new trial.

(1) 1 De G. Jo. & Sm. 353.

(2) The objection was founded on the 3rd, 4th, & 5th sections in the *Chancery Amendment Act*, 1858 (21 & 22 Vict. c. 27), and the 1st, 2nd, & 3rd sections of the *Chancery Regulation Act*, 1862 (25 & 26 Vict. c. 42). The 3rd section of the Act of 1858, after authorizing the Court of Chancery to assess damages and try questions of fact by a jury, and providing for summoning juries, &c., goes on thus:—"And generally for all purposes of, or auxiliary to, the assessment of damages on the trial of questions of fact by a jury before the Court itself, and in respect of new trials, the Court of Chancery shall have the same jurisdiction, powers, and authority, in all respects, as belong to any superior Court of common law, or to any Judge thereof, for the like purposes; Provided that from any order made by the Court on application made for a new trial there shall be the same right of appeal as from any other order of the Court." The 4th section,

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Mr. *Grove*, Q.C., and Sir *H. Cairns*, Q.C. (Mr. *Hindmarch*, Q.C., & Mr. *W. N. Lawson* were with them), for the Respondents, were heard in support of this objection:—

The Appellants here have not complied with the provisions of the Statutes. They have not applied to the Judge who tried the cause, or to the Court of Appeal in Chancery, to grant a new trial, and consequently the power of appealing to this House as to the findings is not brought into operation. They are restricted to an appeal against the decree and what appears on the face of the decree, and cannot bring into question the matters of fact or the findings on which they are founded. Now all the reasons for their appeal are directed to those matters of fact. Such an appeal is therefore incompetent. The trial and the findings may be revised, but not in this way. The Statute has pointed out a particular mode of proceeding; that mode has not been observed, and consequently the right to bring up the decree here on the findings is gone.

Whether tried with or without a jury, if the findings are complained of, they must be set right by a motion for a new trial. The consent in this case to try without a jury makes no difference. In *Stuart* v. *Forbes* (1) the general rule was recognised that par-

after giving directions as to the mode of trial, enacts that, "Upon every such trial the Court of Chancery shall have the same powers, jurisdictions, and authority as belong to any Judge of any of the said Courts sitting at *Nisi Prius*." The 5th section authorizes the trial of questions of fact before the Court itself without a jury, goes into details of the mode of proceeding, and with regard to trials had before a Judge of the Court of Chancery without a jury enacts, "That the verdict of the Judge shall be of the same effect as the verdict of a jury under this Act; and the proceedings upon and after such trial, as to the power of the Court, the evidence and otherwise, shall be the same as in the case of trial by jury under this Act. Provided that in the case of a trial under this Act any person may apply for a new trial, either to the Judge before whom the trial was heard or to the Court of Appeal in Chancery." The 1st section of the *Chancery Regulation Act*, 1862 (25 & 26 Vict. c. 42), provides "That in all cases in which any relief or remedy within the jurisdiction of the Courts of Chancery, &c., is sought in any matter instituted or pending in either of the said Courts, and whether the title to such relief or remedy be or be not incident to, or dependent upon, a legal right, every question of law or fact, cognizable in a Court of common law, on the determination of which the title to such relief or remedy depends, shall be determined by or before the same Court." The 3rd section made all the provisions of the former Act with relation to the determination of questions of fact applicable to this Act.

(1) 1 Mac. & G. 137.

ties cannot, by their consent or otherwise, on a rehearing or appeal, call upon the Court to decide on a matter which in the usual course ought to be referred to some other tribunal. The case of *Craig* v. *Duffus* (or *Duffy*) (1) is directly in point. That was an action for damages on a breach of contract. It was appointed to be tried by a jury. The parties consented that it should be sent to the Court of Session to be tried by a Commissioner. It was held that the subsequent proceedings, adopted by virtue of this contract, were extra-judicial, and, as such, could not be made the subject of appeal. *Dudgeon* v. *Thomson* (2), and *Robin* v. *Hoby* (3), are to the same effect. When the Lord Chancellor's order here was discharged by consent, the parties were in the same condition as if they had consented to abandon the jurisdiction of the Court and to take the decision of any private tribunal.

The *Attorney-General* (Sir *R. Palmer*), and Sir *F. Kelly*, Q.C., (Mr. *Wellington Cooper*, and Mr. *Chance*, were with them), for the Appellants, in answer to this preliminary objection:—

The object of these two Acts was to enable the Court of Chancery to decide in a complete manner and without extraneous assistance all the cases that arose within its jurisdiction. In other respects the proceedings were rendered analogous to those of a trial at law. An appeal against a finding or verdict is given in a particular manner by the Statute, but it does not follow that no other mode of proceeding can be adopted. The section contains no words with that excluding effect. [LORD WESTBURY:—Suppose you objected to the admission or rejection of evidence at the trial—could you, on an appeal against the decree founded on the verdict at the trial, discuss that objection?] We could. [LORD WESTBURY:—Nothing would be more inconvenient.] The section says, that the verdict of the Judge without a jury shall be of the same effect as a verdict, not of a jury at common law, but, "of a jury under this Act." That shows that the Judge was to be at liberty to deal with it as he would deal with his own decision under the old system at a hearing. The same results must follow in each case. It is not asserted,

(1) Both names are used; 6 Bell's Sc. Ap. Cas. 308.

(2) 1 Macq. Sc. Ap. Cas. 714.

(3) 2 Macq. Sc. Ap. Cas. 478.

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on the other side, that a new trial can take place before any other Judge than the Judge who tried the case. His consideration of the case at the hearing is therefore, practically, a substitute for what a motion for a new trial would have been, had the trial taken place before a jury. The Act merely introduced a new mode of taking evidence, but did not cut off the right of appealing against the decree founded on it. The observations of the Lord Chancellor when the matter was before him (1) justify this argument, for they shew that his Lordship considered it most material that the whole matter of law and fact should be before the same Court on account of the difficulty of separating the one from the other. In the case of *Simpson* v. *Holliday* (2), a patent respecting a certain sort of dye was in contest. All the findings there were in favour of the patentee, and an injunction was granted on those findings. No motion for a new trial had been made. When the case was before Lord Chancellor *Westbury*, he reversed the order of the Vice-Chancellor and found the patent to be bad in law. The Lord Chancellor then decided as the Appellants ask the House to decide now. [The LORD CHANCELLOR :—Here is an injunction granted on the findings, it is appealed against; to test the value of that we must, according to your arguments, look not to the findings but to the evidence on which the findings rest.] In the case of *Simpson* v. *Holliday* there had been findings, and the findings were expressly reversed. What was done there ought to be done here. In *Curtis* v. *Platt* (3), there was a patent for improvements in a spinning machine, and the case was tried before Vice-Chancellor *Wood*. All the issues were found by him for the Plaintiff, except the infringement. The case was brought before Lord Chancellor *Westbury*, on a motion which was, in substance, a motion for a new trial, namely, that the fifth issue, that as to the fact of the infringement, ought to have been found for the Plaintiff and not for the Defendant. The case was thus taken from before the Vice-Chancellor, the motion for a decree was ordered to be made before the Lord Chancellor, and there again the whole case was dealt with, and a decree made. In these cases the mere formality of moving for a new trial was disregarded when the substance of the whole case

(1) 1 De G. Jo. & Sm. 353. (2) Not reported.
(3) Not reported, now under appeal.

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was before the Court. It is so here, and the decree of the Court is properly the subject of appeal.

The Scotch cases do not apply here. The thing waived by the parties, namely, the assembling of a jury, was something which a party has a full right to waive, for the Statute allows the party to try before a Judge and jury, or a Judge alone. It would be a great evil to say that when a case like this is to be tried in the Court itself, the parties shall not be at liberty to waive the trouble and expense of summoning a jury. In the case of *Morris* v. *Davies* (1), where there had been three trials, there was a motion in the Court of Chancery for a new trial, and the parties, in order to avoid farther expense and delay, consented to take the Lord Chancellor's decree on the evidence already given, and it was held that the decree was subject to appeal to this House, the reason given being that no undertaking not to appeal appeared on the face of the decree. The verdict here on each of the issues involved matter of law as well as of fact; it was impossible to separate them; and the decree was but the consequence of the findings on those issues. The final decree embodies the postea, or findings—the whole is before the House on an appeal against that decree. There is nothing in the Statute or in the rules of practice which forbids the House to entertain the appeal, or which requires it, because the mere form of moving for a new trial has not been gone through, to declare that the decree, founded on a verdict pronounced by the very same Judge who made the decree, shall not be re-considered. *Armstrong* v. *Armstrong* (2) is a very strong case in favour of this appeal. There the legality of a partnership under the *Pawnbrokers' Acts* was brought in question. There was a trial before the Lord Chief Baron *Lyndhurst*, and a verdict was given for the Plaintiff. A bill of exceptions was tendered; it was held that that could not be maintained in the case of the trial of an issue, for in such a case the regular course was to apply for a new trial to the Court which had directed the issue. When the case came before the Master of the Rolls on farther directions, he, looking at the facts as they appeared at the trial, pronounced his decree, setting aside the verdict on the issue, and decreeing in favour of the Defendant, on account of what he declared to be the illegality of

(1) 5 Cl. & Fi. 163. (2) 3 My. & K. 45.

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the transaction. On appeal the decree of the Master of the Rolls was affirmed. That is a clear authority for the present proceeding. The Acts here are enabling and not disabling Acts, and must be so construed. [The LORD CHANCELLOR :—The trial before the Judge alone was at variance with the order of the Lord Chancellor. Could that be supported ?] If there was anything contrary to law in that, then the order was void, and the whole proceedings were void, and there is an end of the decree. On the other hand, if the Vice-Chancellor had jurisdiction, if the consent did not absolutely destroy it, there was nothing to deprive the party of the right to appeal against the way in which he had exercised the jurisdiction.

Sir *H. Cairns* replied.

THE LORD CHANCELLOR (Lord *Cranworth*) :—

My Lords, this is a most important preliminary point ; indeed, so important, that were it not that we have had ample opportunity for considering it, both during the argument, and between the argument yesterday and to-day, I believe I should have been inclined to suggest to your Lordships that it might be expedient to take a little time to look into the subject. But I confess that, from the very first moment, I have felt this very strongly, and having looked into all the authorities that we have on this point, and the Acts of Parliament, I am prepared, though not without reluctance, to say that I think we have no power whatever to go into this case beyond deciding whether or not the decree is right, looking at the decree itself, and at nothing but what is contained in it.

My noble and learned friend called yesterday for the petition of appeal. I had done the same thing the day before, because it struck me that we can by no possibility in this House do anything but determine whether or not that which is complained of is open to complaint. Now the decree in this case states merely that the cause came on to be heard upon all the days mentioned, and that the parties proceeded to the trial of the questions of fact ; and then, after stating the issues that were directed, it proceeds : "Upon opening and debate of the matter, and hearing the orders and record for trial and the endorsement thereon, the letters patent and the specification enrolled in pursuance thereof,

the answers of the Defendants, and what was alleged by the counsel on both sides, this Court did order that this cause should stand for judgment; and the same so standing for judgment on this day accordingly, in the paper of causes in this Court, in the presence of counsel on both sides, this Court did order and decree"; and then it proceeded to award a perpetual injunction.

Now, the simple question is, whether, reading that decree, and that decree only (I include under the word "decree" everything that is directly referred to in the decree), there was sufficient to warrant that injunction. If there was, the cause was properly decided. If there was not, the cause was wrongly decided.

What is said is, that this trial was a trial of a peculiar nature, at least peculiar within the last ten years, because it was a trial, not upon an issue directed according to the old form, but it was a trial before the Judge himself, in which case the Judge performs the functions both of Judge and jury.

Now let us consider how the case would have stood under the old practice. Under the old practice the Court of Chancery would have said in substance this:—"The right to this injunction depends on the question whether or not the Plaintiff seeking for this injunction has or has not the legal right which he asserts; and, before this Court will proceed to determine whether he shall have an injunction or not, he must establish to the satisfaction of the Court that he has that legal right." Therefore the cause, according to the ordinary course of the Court, would have stood over for a limited time, with liberty in the meantime for the party to bring his action to establish his legal right.

By the Act of the year 1862 all that mode of proceeding was got rid of; and that preliminary trial as to the legal right is now decided in the Court itself, *intra mœnia* instead of *extra mœnia*. And how is it decided? Not by having a trial under an issue directed to one of the Courts of Common Law. In that form, of course, there could be no trial, because the Act of 1862 says it shall be decided by the Court itself. There can, therefore, be no issue directed: but the course of proceeding is regulated by the Act which passed in the year 1858, and which governs all proceedings of this sort.

That Act has been referred to so often that I shall not trouble

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your Lordships by referring to it again. It substantially amounts to this, that by the 3rd section authority is given to the Court to try by a jury before itself that which was formerly tried without the walls of the Court before a jury presided over by one of the Judges of a Court of Common Law: and, by the 5th section, that which may be done with a jury is also authorized to be done without a jury, namely, by a trial before the Judge himself.

Now, it is plain, not only upon the language of the Statute, but by the clear meaning of the Statute, that that which is so done, whether with a jury or by the Judge alone without a jury, was meant to be a substitute for, and to have all the same incidents as would have attached to a trial before one of the Judges of the Courts of Common Law and a jury, out of the walls of the Court of Equity, according to the ancient practice. Therefore it is plain that what took place before the Court, although it is a proceeding in the cause and in the Court, is in reality in the nature of a preliminary proceeding. The Judge of the Court, either with a jury or without a jury, according as the trial may be had in the one mode or in the other, is to proceed just as would have been the case in the trial of an issue directed to find answers, aye or no, to the several questions put in issue. That is evidently the course which was to be pursued, and which indeed the learned Judge understood was to be the course to be pursued. I say which he understood, because, in fact, he finds answers to the four issues just as would have been done if the trial had taken place on issues directed to be tried before a Court of Common Law.

That being so, how are we ever to arrive at any inquiry as to what has taken place that has led to the finding of those issues? The very meaning of the Legislature was that all such inquiries should be stopped out. There would be no use in directing a trial if, after the trial had taken place and the verdict had been found, it was all to be thrown open, and either party was to be at liberty to say: "Truly you have the verdict, but you have also the evidence. You may look into the matter, and come to what conclusions you, the Court, think fit, not only upon the verdict, but upon the evidence which led to that verdict." This would be to create a complete chaos: instead of solving anything it would

make "confusion worse confounded." It is plain that that was not the meaning of the Legislature; and I think it must have been so understood by the Vice-Chancellor. I say I think that, because his Honour, although I think he did not take a very convenient course, said: "I shall direct the cause to be set down for hearing immediately after the finding of the issues." Now, when his Honour said that, he plainly shewed that he understood that the finding of the issues and the deciding of the cause were two different matters. And although it is clear, from the shorthand writer's notes, that his Honour gave his judgment at the same time when the finding took place, namely, upon the 26th of May; yet it is also clear that the decree was not drawn up until some days afterwards, namely, the 18th of June. They were, substantially, therefore, two different proceedings. Now, I think that not only it would be much more convenient if that were always done, but it seems to me that in this case it was practically so done; for although his Honour gave his judgment in terms upon the 26th of May, there was that interval between the 26th May and the 1st June, according to the dates of the order; and there would undoubtedly have been a much longer time, if the parties had wished it, to enable them to move for a new trial, or to set right anything that had been done wrong in the conduct of the trial. Nothing, however, of that sort was done; and what is now proposed is, that your Lordships, looking at this decree, shall be at liberty (because as far as I can collect the argument goes to that extent) to look into every word of it, and see how it and every part of it, bears upon the question of these issues, and to see whether you think that his Honour came to a correct conclusion upon the different issues, one or all of them.

My Lords, it is impossible that that can be a correct course. I feel exceedingly embarrassed at the position in which this House is placed; because I do feel that the parties may have been misled as to the course that they were taking. They may have thought that the course which they are endeavouring to follow before your Lordships was left open to them; but we are bound to see that we do not let the proceedings of this House, and the proceedings coming from other Courts to this House, be placed in such a predicament that parties shall not know what it is that they have

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from time to time to answer. Looking at this case in that point of view, I cannot come to any other conclusion than that we have nothing to do but to look at this decree, and see whether on the face of this decree the Appellants can shew that there is any error. For that purpose I think they are confined to the decree itself. Of course when that decree refers to the evidence which has been given in the cause, which is substantially part of the decree, it may be looked at here, and always is looked at if necessary. But here there is no reference in the decree to any evidence. It does not appear that there is any evidence in the cause, except the evidence which of course there must have been upon the trial of the issues; there is no reference in the decree to any evidence whatever; there is no reference whatever to anything but the findings on the issues, the patent, the specification, and the answers of the parties. So far as the Appellants can shew that upon the face of any of those proceedings, there is any ground for quarrelling with the decree, I think it is open to them to do so, but beyond that I think nothing is open.

My Lords, I believe it is not the custom of the House to give judgment, as it were, piecemeal; but it was necessary, I think, that we should go this length before the argument proceeded any farther, in order to shew to the parties how far this question is open, and how far it is not open. Therefore my advice to your Lordships is, to allow to the Appellants liberty to proceed to shew that upon the face of this decree, and those matters which are referred to in the decree, there is error which your Lordships ought to set right, and that the injunction ought not to have been granted, or that in some way this decree ought to be modified; but that beyond that, nothing is open to the Appellants.

I do not know whether the parties will be ready to proceed now, after this intimation, to deal with that part of the case which we think is open to them. If they are, I should advise your Lordships to hear them, but if they would require to have the delay of a day or two to look into the matter, I should move your Lordships to afford them that opportunity.

Mr. *Attorney-General*:—We are perfectly willing to proceed now, my Lord.

LORD CHELMSFORD:—

My Lords, I agree entirely in the view which has been taken by my noble and learned friend upon the woolsack.

It has been argued that the trial of the questions of fact by Vice-Chancellor *Stuart*, either proceeded regularly under the *Chancery Amendment and Regulation Acts*, or was a mode of trial agreed upon by the parties. In the latter case the appeal upon the trial itself would be altogether incompetent—in the former, the extent to which the decree is open to appeal will depend upon the nature of the proceedings.

I should extremely regret to be compelled to decide the case upon the strictly technical ground of the parties having consented to the mode of trial which took place, and as having thus precluded themselves from an appeal upon the whole case. There can be no doubt that when the Lord Chancellor ordered the questions of fact to be tried by a jury, before Vice-Chancellor *Stuart*, it was not competent to the Vice-Chancellor to substitute for this a trial before himself without a jury. But it is equally clear, that substantially, the order of the Lord Chancellor was, that the question should be tried, not in a Court of Common Law, but in the Court of Chancery, and if an application had been made to his Lordship, he would probably not have hesitated to vary his order, and to have directed the trial to be had before the Vice-Chancellor alone. Strictly speaking, the form of trial must be taken to have been founded on the consent of parties, and, therefore, according to the cases cited, it may, perhaps, be that no appeal will lie. But I should be reluctant to proceed upon this purely technical ground without examining the authorities more closely, to see whether this case may not be distinguished from them.

Assuming, however, the trial of the questions directed by the Lord Chancellor to have taken place regularly under the *Chancery Amendment Acts*, the extent to which the proceedings before the Vice-Chancellor are open to review by appeal to this House is a more important subject of consideration.

Under the order of the Lord Chancellor, directing a trial of the questions of fact, the duty of the Vice-Chancellor was a plain and simple one. It was not competent to him to blend the trial of the

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questions of fact with the hearing of the cause, nor strictly speaking did he do so. In his order, varying the order of the Lord Chancellor, his Honour directed that the cause should be set down, and be in the paper of causes for hearing on the same day as the questions were appointed to be tried, but after the trial of the said questions. It appears that, for the convenience of having the whole case before him at once, the questions of law and fact were considered together, but the trial of the questions of fact, and the hearing of the cause, must nevertheless be treated as separate and distinct matters. The Vice-Chancellor having found all the four questions in the Plaintiffs' favour, the postea was made up on the 26th May, and the decree is dated the 1st June, 1864.

It has been said that the course adopted by the Vice-Chancellor, and apparently consented to by the parties, enables the Defendants to pass by the trial altogether, and by appealing from the decree, to open the whole case before the House, as upon an application for a new trial. But this is not so. Under the 5th section of the *Chancery Amendment Act*, 1858, the Defendants might have applied for a new trial, either to the Vice-Chancellor or to the Court of Appeal in Chancery. This alternative is given where the trial is by the Judge alone, because it would, in general, be idle to ask the Judge to reverse his own finding.

The Defendants, however, say that they did not want a new trial; that their objections to a decree depended upon questions of law arising upon the evidence, and that the only course open to them was by appeal to this House. But it appears to me that they are in error in this respect. After the questions of fact had been determined by the Vice-Chancellor, it was competent for the Defendants, either to apply for a new trial, or to object to a decree being made in favour of the Plaintiffs on questions of law arising upon the evidence, and the argument upon such objections would have been the hearing of the cause. Instead of adopting this course the Defendants chose to come at once to this House, by way of appeal from the decree.

In this state of things the question is, what is open to the Defendants upon this appeal? All the particulars upon which the decree is stated to have proceeded are open to consideration, but the Appellants are not at liberty to go beyond them, and to

question the facts by which the elements of the decree were ascertained. The findings of the Vice-Chancellor must, therefore, be taken to be final and conclusive; but the Appellants are at liberty to contend that, granting everything upon which the decree is founded, the decree ought not to have been made.

LORD WESTBURY:—

My Lords, after the judgments which have been delivered it might probably be unnecessary for me to detain your Lordships by any observations; but the nature of the arguments, the importance of the case, and the extent of the questions discussed, render it, I think, desirable that I should add a few words to what has been said by my noble and learned friends.

My Lords, this case is now heard before your Lordships in a somewhat anomalous manner, but most conveniently; for it was most requisite to determine the basis upon which the arguments upon this appeal should proceed, and, accordingly, the objection is taken that it is not competent to the Appellants to bring into controversy the findings of fact made by the Vice-Chancellor and embodied in the postea, which, using the language of the Statute, may be called the verdict of the Court.

That objection is founded upon two grounds; first, that the findings of the Court are made final and conclusive by the Statute; secondly, that the procedure adopted by the Court was not a procedure in conformity with the settled and established *cursus curiæ* of Chancery, but that the conclusions were arrived at by the learned Judge sitting and exercising, not his regular judicial authority, but an authority which had been delegated to him by the consent of the parties.

I may say in the outset that if the objection made had depended wholly upon the second ground, I should have struggled hard to emancipate the parties from the effect of that objection, even although the objection might be considered as technically well founded; but, having regard to the other objection, and the findings of the Court being, in my judgment, made final and conclusive by the Statute, I am compelled to give way to that objection, however much I may regret that probably the full extent of

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the right of the Appellants may be defeated by the application of that Statute.

It is necessary to advert for a few moments to some very well known and established principles, because the argument on the part of the Appellants has, to a certain extent, forgotten the clear distinctions which have been long established by those principles. It is a settled principle of common law that questions of fact shall be tried by a jury. It is embodied in the language of the familiar maxim: *Questionibus facti non respondent judices; questionibus legis non respondent juratores.* When the Court of Chancery assumed this jurisdiction it found itself without the power of summoning a jury, or of serving witnesses with subpœnas to attend and give evidence personally before the Court. The result was, that in the procedure of Chancery according to the old practice these rules were established. If in the evidence given before the Court, or in the proceedings before the Court, there arose a considerable controversy upon a question of fact, it was usual for the Court of Chancery to direct an issue to be tried before a jury at common law, for the purpose of informing itself in what manner that question of fact ought to be answered; but when the proceedings before the Court of Chancery involved a mixed question of law and fact, then it did not direct an issue, but it directed an action, or it retained the bill in order that an action might be brought, for the purpose of having the assistance of a Court of law both upon the question of fact by means of a jury, and upon the question of law by means of the Court. A third description of cases was this, namely, where relief was sought in equity founded entirely upon a legal title, and there where the legal title had not been established by the decision of a Court of law, it was the habit of the Court of Chancery to direct the bill to be retained, with liberty to the Plaintiff to bring an action to establish his title; and such in the case of a bill brought by a patentee for relief in the Court of Chancery was the settled rule of procedure, with the exception perhaps only of cases where the patent was of such age, and had been so generally recognised and submitted to by the world, that the Court of Chancery did not require that its legal validity should first be established.

Now, in that state of things it occurred to all men desirous of

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amending the law and removing the inconvenience consequent upon that necessity of a double procedure, that it would be desirable to make the Court of Chancery self-sufficient, and to enable itself to try, by the aid of a jury, and by the oral examination of witnesses, all questions arising before it both of law and of fact. Accordingly, by the *Chancery Amendment Act*, 1858, in the 3rd section, power was given to the Court to direct any question of fact to be tried by a jury before itself; and then, in another section, the Court was empowered to dispense with the jury and itself to try the question of fact. This power given to the Court was converted into an obligation by the Act of 1862, and extended to questions of law as well as to questions of fact.

It is quite clear therefore, that the procedure to be adopted under these Statutes would, in the case of a patent, be analogous to, and altogether usurp the place of, the old mode of procedure which would have been adopted under the former practice. The Legislature was extremely desirous of preserving and giving to the mode of procedure which it thus directed, the same legal effect that would have been given to the old procedure under an issue at law or an action at law. This desire has been emphatically expressed by the Legislature in the words of the 5th section, in which it directs "That the verdict of a Judge shall be of the same effect as the verdict of a jury under this Act." The verdict of a jury under the Act would be a conclusive answer to the question of fact tried before that jury; and it would be a conclusive answer binding upon the Court unless the Court thought it right to set aside that verdict, or to come expressly, upon an examination of the evidence, to a different conclusion.

The argument on the part of the Appellants has been chiefly applied to shew that in the case of issues directed by the Court of Chancery it would be competent to the Court, upon the return of the postea, to disregard the verdict of the jury, and at any stage of the cause to examine the evidence for itself; to re-try the cause; to re-try that question which it had previously directed to be tried by the jury; to derive its own conclusion from the evidence, and to substitute that conclusion for the verdict. Now I will venture to say, speaking from the result of a very long experience, that I never remember a case where an issue had been directed by the

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Court to try a question of fact, and the verdict of the jury was given on that issue, that the Court, without a motion for a new trial, or a motion for a judgment *non obstante veredicto*, ever entered into the question and set aside the verdict of a jury. And the reason is plain, as I took the liberty of suggesting during the argument; because the Court has already by its order directed that very question to be tried by the jury. What is the meaning of directing the question of fact to be tried by a jury? Why, that you may get an answer to that question, and that answer, which is called the "verdict," becomes thenceforth the ground on which your farther judicial examination and judicial conclusion must be based. In like manner this Act of Parliament, the *Chancery Amendment Act*, enables the Court to direct any question of fact to be tried by a jury; and when it is tried by a jury the verdict of the jury is binding, unless there should be cause to set aside that verdict and to direct a new trial; or unless there may be some cause for entering a judgment upon matters of law *non obstante veredicto*.

Then the language of the subsequent section enabling the Judge to try the case without a jury, and giving the verdict of the Judge the same validity as the verdict of a jury under the Act, makes the verdict of the Judge the answer to the question of fact, and substitutes it thenceforth for the verdict of a jury, as the guide for the Court in its future proceedings, and the basis upon which its ultimate decision must rest, so far as such question, as to matter of fact, is necessary to be answered with a view to that conclusion.

My Lords, these things are so plain upon the Statute that I think, without even adverting to the terms of the order, and wholly independently of the language of the order, it is a necessary consequence of the statutory provision, that if these four issues directed to be tried by the order of the Lord Chancellor have been tried by the Vice-Chancellor, and have been answered by the Vice-Chancellor, the answers of the Vice-Chancellor have by the Statute the same effect as the verdict of a jury would have; and it would be wholly unconstitutional and wholly contrary to the whole tenor of proceedings both at law and in equity to take upon ourselves to disregard that verdict as the conclusion of the inquiry as to the fact, and to examine the foundation of the conclusion of the jury, and try the question whether that foundation is right or not. You

can only do it by a proceeding directed to that end specifically: and if there be no such proceeding, the verdict of the jury becomes the final *res judicata* upon the question of fact, and upon that basis, and that basis alone, must all the farther judicial proceedings be rested.

Now this has been very accurately done in the orders which have been made in this case. The first order directs the questions, enumerating them, to be tried by the jury. The Court of Chancery has adopted the model of procedure at Common Law. The record was accordingly made up, substituting only, for the jury, the Judge, as the tribunal for the trial of questions of fact. Then there is upon the record, so made up, an endorsement, in regular form, of the postea, which contains the answers of the Judge to those questions, that is, the conclusions of the Judge upon those inquiries of fact. Then follows the decree, in which, without any reference to what the findings were based upon, the findings are embodied as the judicial foundation of the decree that subsequently follows. And all that it is competent for this House to do when that decree, which has been enrolled, is brought up here by a petition of appeal, is to examine the question whether, upon the face of the decree, the conclusions of the decree are or are not rightly founded. What have you on the face of the decree? You have on the face of the decree the findings of the Vice-Chancellor, which are to have the same effect as the verdict of a jury. Well, but if you had a record brought up to you from a Court of Common Law, in which there were—the verdict of a jury, the postea, and the final judgment upon it,—the verdict of the jury, which is the foundation of the judgment, could not be in any manner questioned or inquired into; and so it is here.

Upon this objection, therefore, my Lords, I think that it is beyond all possibility of doubt that it is not competent to your Lordships to have brought before you, for the purpose of impugning any portion of these findings, any part of the evidence that was adduced before the Vice-Chancellor. Whatever question of law may arise consistently with the facts embodied in those findings, and with the answers to the issues which are there contained, whatever may be brought before the House consistently with those findings not being in any manner questioned, may be perfectly

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open to the Appellants; but any argument, so far as it refers to any question of fact, must be an argument which is in every respect consistent with the truth and the unquestioned character of the findings so embodied in the decree.

I was very anxious to ascertain what had been done by the Vice-Chancellor; because we were told again and again that the Vice-Chancellor, in point of fact, had said that the whole of the evidence must be regarded as evidence taken on the trial of the cause; and I put it, therefore, to Sir *Fitzroy Kelly* to tell me whether the argument could be carried so far as to hold that the Vice-Chancellor had disregarded the issues, and disregarded the order for trying those issues, and had considered himself as trying the cause, as if there had been no such order. My Lords, it must be clear, upon an examination of the matter, that what fell from the learned Vice-Chancellor was never intended to do this. He thought it was desirable the whole argument should be gone into, the argument upon the matters of fact involved in the issue as well as the argument upon the matters of law; but the Vice-Chancellor has carefully preserved the most direct proof in his judgment that he, throughout, regarded himself as trying the issues; and, accordingly, his judgment concludes with the words that he finds, in answer to the four issues, in the affirmative with regard to all.

I do not think, therefore, my Lords, that it is possible for the Appellants to derive any aid from any expressions that fell from the Vice-Chancellor during the trial or in the course of the argument. It is clear, both from the form of the verdict entered up, that is, from the form of the postea, and from the language of the Vice-Chancellor, that the Appellants must have known, and thoroughly known, that the Vice-Chancellor had come to distinct findings in answer to the questions that he was bound to try; and therefore the Appellants were under the obligation of resorting to the Act of Parliament, and ascertaining from the Act of Parliament the course which, under that Statute, it was their bounden duty to follow. Therefore it must not be supposed that this House gives way to a technical objection. This House is compelled, as all are compelled, to observe the Act of Parliament; and inasmuch as we find a distinct enactment, that the verdict of the Court shall have the same effect as the verdict of a jury, and as we know perfectly well that

the verdict of a jury, if it remained unchallenged, would be conclusive, we must hold the verdict of the Court as equal to the verdict of a jury; and in so doing the cause is not decided on any technical objection, but it is decided by the application of the clear language of the Act of Parliament.

As my judgment rests upon that ground, I think it unnecessary to advert to the other ground upon which the objection is based, a ground undoubtedly which one would not desire to see extended. At the same time it is extremely necessary to preserve the distinction that has been taken between the ordinary jurisdiction of the Court and the consequential jurisdiction of the Court, and which I think I am bound to say was rightly taken in the cases decided by this House which have been cited. But for the reasons already given, it is unnecessary to pray the aid of those cases in support of the objection which has been now taken.

My Lords, I apprehend that this will not be made the subject of any order by your Lordships; it is, in point of fact, an intimation of your Lordship's opinion, by which the argument of this appeal must be regulated; that the appeal is competent to the Appellants only to the extent to which they can shew matter of error in the decree consistently with the finding of the Vice-Chancellor not being in any manner challenged.

The *Attorney-General*, and Sir *Fitzroy Kelly*, were heard on behalf of the Appellants, in the restricted form imposed by the above judgment.

The Counsel for the Respondents were not called on.

THE LORD CHANCELLOR:—

Your Lordships having already decided that the Appellants could only be heard upon what appeared on the face of the decree, I have only very little to add in respect of what has since been argued; because, in my opinion, that decision necessarily involves this, that your Lordships were bound to take it for granted that the findings of the Court were correct, and that everything was correct which did not appear to be wrong on the face of the decree.

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Now, the point that has been said to be wrong on the face of the decree I understand to be this: This invention, it is argued on behalf of the Appellants, consisted of two parts—we will call them A and B—and they say: Your invention must appear upon the face of the specification; and on the face of your specification you have claimed two processes, A and B. At the trial it is said it was admitted by the counsel that B was not new. The Appellants say you did not pretend, or give any evidence to shew that it was new. But, say the Respondents, we are not bound to do that, for we contend that, according to the true construction of the specification, B is no part of the invention claimed. The learned *Attorney-General* and Sir *Fitzroy Kelly* contended that that is a matter open to them to argue now before your Lordships. I am clearly of opinion that that is not so, because if that was the correct view of the case, of course it would be quite obvious (as was pointed out in the course of the argument) that the finding that the invention was new was a wrong finding, because the invention means all that is contained in the specification. Of course it does refer to the specification, and if that includes two processes, one of which was old and one new, then to find that the invention was new, was wrong, and that could have been set right by a motion for a new trial. That course of proceeding possibly might have been modified, as it was by the late Lord Chancellor in the case of *Simpson* v. *Holliday*, where it was quite obvious that justice could be completely done, where the circumstances were such as to call for it, without the necessity of going through the whole process of a trial over again. It appears to me, therefore, that this matter is not open before your Lordships now, and consequently that no objection can be validly made to the decree.

Then there is this point of form: It is said that the decree was wrong, because it was a decree drawn up before the time of moving for a new trial had elapsed. Perhaps it is worth suggesting for inquiry whether it may not be a convenient practice that there should be a rule for the future that decrees shall not be drawn up, except by consent, before the time for moving for a new trial has passed. I do not know how that may be. But here what took place was this: on the 15th of January, when the order by consent was made substituting the mode of trial by the Judge instead of

by a jury, it was also ordered that the cause should be set down for hearing at the same time, or immediately after the termination of the trial. It may be doubtful on the face of that order whether that part of the order was or was not by consent. If it was by consent, of course no party could complain of that having been done which all agreed should be done, namely, that the cause should be heard; and it is said that when the parties consent that a cause should be heard on a particular day, of course by implication they consent that the cause should be disposed of on that day. Therefore, if that was by consent, there was an end of it; and if it was not by consent, then it was an order made by his Honour the Vice-Chancellor, which possibly might have been complained of. No doubt, if either party had said we would rather have some time to consider whether there shall be a motion for a new trial or not, we must presume that it would have been attended to. But that forms no part of the subject-matter of the present appeal. I am of opinion, therefore, that the pronouncing of the decree a few days after the disposal of the trial, although it might not have been a very convenient mode, was one which either was consented to, or certainly not objected to; it was done in conformity with what seems to have been the wish of the parties.

It appears that the Appellants themselves enrolled the decree. I do not complain of that. There is no doubt that what was said is perfectly true, namely, that if parties wish to get the opinion of this House they have a right to enrol the decree at the earliest possible moment. But I think they can hardly complain that time was not left for them to move for a new trial when they themselves made it impossible by enrolling the decree. But although a decree is enrolled, I am certainly of opinion that, if a motion is made for a new trial within the time allowed for that purpose, parties cannot be deprived of that right which the Statute gives them to make such a motion, because the other parties have proceeded rapidly to get the decree enrolled. It appears to me that this is a mere question of irregularity, and one that cannot be now attended to.

I regret that I do not see my way to come to a conclusion upon the question of costs different from that which is the ordinary rule

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of the Court, that the costs must follow the event. I think, therefore, the appeal must be dismissed with costs. I therefore move your Lordships that the appeal be dismissed with costs.

LORD CHELMSFORD:—

I am entirely of the same opinion.

LORD WESTBURY:—

My Lords, I feel extreme regret that I am obliged to concur in the motion. The conclusion is arrived at wholly by force of the Statute. My regret is because I feel that the Appellants have fallen a sacrifice to the intricacies of a very involved proceeding, the mode of dealing with which they do not appear thoroughly to have understood. The objections taken to the decree are wholly untenable, and such as it would not be competent to the House, consistently with the due interpretation of the Statute, to adopt. I feel myself obliged, therefore, to concur with my two noble and learned friends that the appeal must be dismissed with costs.

The following Order was afterwards made:—

Counsel for the Respondents having taken a preliminary objection to the competency of the appeal, counsel were heard on, &c. to argue the question of such competency; and having been fully heard thereon, and the House having intimated to the Appellants' counsel the extent to which they were at liberty to contend against the decree appealed from, and the Appellants' counsel having been heard pursuant to such intimation, and the Respondents' counsel not having been called on to answer the same, the counsel were directed to withdraw: And it was ordered that the decree of the Court of Chancery of the 1st of June, 1864, be, and the same is, hereby affirmed, &c.

Solicitors for the Appellants: *Tuke & Valpy.*
Solicitors for the Respondents: *J. H. Johnson.*

GEORGE T. S. DE WINDT . . . . . APPELLANT;

AND

HARRY W. D. DE WINDT . . . . . RESPONDENT.

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March 1.

Will—Tenants in tail, joint, or in common.

G. B., by a holograph will made in 1849, gave "all my freehold property to *J. C. J.*, and after his death to his sons in tail lawfully begotten, and in the event of his or their death without sons lawfully begotten, then I leave the said estates to my cousin *J. H. H*, and after his death, to his sons lawfully begotten, beginning with the elder:"—

Held, that the words "beginning with the elder" related only to the later of the two devises.

Vice-Chancellor *Wood*, in the Court below, prefaced his decree with the words "the guardians of the two infants requiring the direction of the Court as to the application of the rents of the real estates," and then declared that on the death of *J. C. J.* his two sons (one born before and the other after the death of the testator), took estates in tail male in remainder in the real estates, and that the younger was entitled to maintenance out of the income arising from the said estates; but made no declaration as to the legal rights of the two sons as joint tenants, or as tenants in common:—

Held, that the decree was right.

GEORGE BRAY, on the 6th of November, 1849, wrote his own will, which contained the following devise and bequest: "I hereby give and bequeath all my freehold property in *Northumberland* to my nephew *Joseph Clayton Jennyns*, and after his death to his sons in tail lawfully begotten; and in the event of his or their death without sons lawfully begotten, then I leave the said estates to my cousin *James Haydock Haydock*, and after his death to his sons lawfully begotten, beginning with the elder;" and then after various specific legacies, the will went on thus: "Whatever is left after what I now give or bequeath of my personal property, I leave to my nephew *Joseph Clayton Jennyns*, and to his sons in tail lawfully begotten."

The testator died on the 22nd of June, 1852, seised of freehold estates in *Northumberland*, and of leasehold houses and other personal property. In September, 1852, *Joseph Clayton Jennyns* (who assumed the name of *de Windt*), obtained letters of administration with the will annexed.

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In March, 1853, the Appellant (an infant), the eldest son of *Joseph Clayton Jennyns de Windt*, filed his bill against his father and the executors named in the will, praying that the testator's real and personal estate might be administered under the direction of the Court, and that the rights of parties might be declared, and for further relief. The Respondent is the second son of *Joseph Clayton Jennyns de Windt*, and was born in April, 1856. By a supplemental order he was made a Defendant in the suit. *Joseph Clayton de Windt* died in August, 1863, and the suit having been duly revived against all necessary parties, it came on to be heard in May, 1864, when the Vice-Chancellor made a decretal order, by which, after reciting that the guardians of the Plaintiff and Defendant required the direction of the Court as to the application of the rents, it was declared that, according to the true construction of the will of *George Bray*, the Plaintiff and the Defendant took estates in tail male in remainder in the real estate of the testator, and that the Defendant was entitled to maintenance out of the income arising from the said estates. And a receiver was appointed, and directions were given as to the personal estate of the testator (1). This was an appeal against that order.

Mr. *Willcock*, Q.C., and Mr. *Harris Prendergast*, for the Appellant:—

The true rule of construction for such a will as the present, was laid down by Lord *Cranworth* in *Jenkins* v. *Hughes* (2), where his Lordship said: "If the language used in a will admits of two constructions, according to one of which property will go in a convenient and ordinary course of succession, and according to another in a capricious and inconvenient course, Courts of justice may reasonably lean towards the former as what was probably intended." The convenient and ordinary course here would be to declare that estates tail in succession in the sons of *Joseph Clayton de Windt* had been created. The sons cannot take as tenants jointly or in common. The Courts have only adopted a construction of that kind where the words of the will gave the estate to two males and the heirs of their bodies, or to two persons who could not intermarry, and the heirs of their bodies. That is described in *Little-*

(1) 4 N. R. 185.

(2) 8 H. L. C. 571, 592.
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ton (1), and an instance of that kind occurred in *Huntley's Case* (2), but no decision was given upon it, as the case went off on a point of pleading. Another instance was that of *Cook* v. *Cook* (3), where *Wilkinson* v. *Spearman*, was referred to, and it was never heard of again till *Edwards* v. *Champion* (4), and *Forrest* v. *Whiteway* (5), in the last-named of which, from the peculiarity of the words, it was held that the estates created were joint tenancies for life, with separate inheritances. Where the words do not impose the necessity of making such a construction, it will not be made. There is no such necessity here. The testator either intended that his nephew should take for life, and his nephew's sons take successively in tail in the ordinary way, or that there should be an estate tail in the nephew himself, *Trash* v. *Wood* (6), which would descend on the Appellant as his heir in tail male. The testator never could have meant an estate tail in common in the sons, for in the first place he knew nothing of the present Respondent, who was not born till after his death; and in the next, such a devise might have the effect of breaking up the estate among a great number of sons. There is not in the will any provision for cross-remainders. He no doubt meant the estate to go to the sons of the nephew, as he afterwards desired it to go among the sons of *Haydock*, as to whom he expressly says, "beginning with the elder." There is no difficulty in making those words applicable to both the devises. They affect the whole will.

The word sons, and the word children, may be taken as words of purchase, or of limitation, according to the whole context of the will: *Robinson* v. *Robinson* (7); *Mellish* v. *Mellish* (8); and *Tyrone* v. *Waterford* (9). In the last case it is true that there were the words "in succession," but even without them the general intent was plain, and the decision did not turn on the word succession alone. In *Evans* v. *Astley* (10), under a devise of this kind, the sons were held to take in succession, for though the words of the will would have given them a joint estate, yet the general intent in it

(1) Co. Litt. 182*a*, Sect. 283.
(2) Dyer 326*a*.
(3) 2 Vern. 545.
(4) 3 De G. M'N. & G. 202.
(5) 3 Ex. 367.
(6) 4 My. & Cr. 324.
(7) 1 Burr. 38.
(8) 2 B. & C. 520.
(9) 1 De G. F. & J. 613; John Rs. 567
(10) 3 Burr. 1570.

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was shewn to be in favour of the ordinary estate tail to the sons in succession, and that intent was acted on. The decree of the Vice-Chancellor cannot be supported without reading the will as if thus expressed,—after the death of *J. Clayton Jennyns* to his sons generally for their lives, and their sons in tail, which would keep the succession suspended till the death of the last tenant for life. The will being made after the date of the *Wills Act*, the words "freehold property" being used in it instead of "real estate," and the testator being *inops consilii*, are all reasons for construing his will as instructions for a will, and considering how a conveyancer would frame a proper technical will upon them. Too much force must not be assigned to particular terms used by a person who did not understand them.

Mr. *Rolt*, Q.C., and Mr. *F. C. J. Millar*, for the Respondent, were not called on to address the House.

THE LORD CHANCELLOR (Lord *Cranworth*):—

My Lords, I think your Lordships cannot have any doubt that this decree of the Vice-Chancellor is perfectly correct. It is just one of those cases on which all the learning in all the books can throw little light, except for the purpose of seeing what has been the rule of construction in similar cases. Here the gift is this: "I give all my freehold property to my nephew, *Joseph Clayton Jennyns*." No doubt, as has been said, if it had stopped there, *Joseph Clayton Jennyns* would have taken an estate in fee simple. But it does not stop there, for it goes on, "and after his death to his sons in tail lawfully begotten."

The first suggestion of Mr. *Willcock* was, that this might create an estate tail in the father. If there had not been the words "in tail," then it might be so, that is, if the words had been "to my nephew *Joseph Clayton Jennyns*, and after his death to his sons lawfully begotten." But it is unnecessary to speculate whether that would have been the case, because there are the words "after his death to his sons in tail, lawfully begotten, and in the event of his or their death without sons lawfully begotten," then over to his cousin *James Haydock Haydock*, "and after his death to his sons lawfully begotten, beginning with the elder."

Now, in the first place, with regard to these words, "beginning with the elder," it is preposterous to say (but it is hardly insisted on) that there is any doubt about their construction; they clearly apply only to the later limitation. Why it was the testator's intent to give a different sort of estate tail to the sons of his cousin than that which he had given to the sons of his nephew, I do not know? It might have been that he did it *per incuriam*, or it might have been that he had some motive which we cannot now fathom. But, as far as the words are concerned, he has clearly not given to the sons of *Joseph Clayton Jennyns* any estate with regard to which he has said that it should begin with the elder.

Now what has he given? Why, after the death of *Joseph Clayton Jennyns* he has given the estate to his sons in tail lawfully begotten. What does that mean? There are but two meanings that can be put in those words. It may mean either to his sons, however numerous, to take as joint tenants for life, with several limitations in tail after the determination of the life estate; or that he gives it to them all as tenants in common. The Vice-Chancellor has abstained from giving any opinion as to which of those two constructions is right—and, I think, very properly. I do not know what pressed on the mind of the Vice-Chancellor; but it occurred to me the moment I read this—what jurisdiction had the Court to decide between these two persons, each claiming the estate? When the suit was instituted, there was but one infant, and he very properly, by his next friend, instituted a suit against the trustees and his guardian, his father, to have the trusts of the will carried into execution. Afterwards another son was born, and a purely legal question arose between the first-born son and the second-born son. The suit was revived, and prosecuted necessarily and properly. Then being before the Court, the guardians of these two children said, "We do not know how to dispose of the rents," and, therefore, the Vice-Chancellor properly prefaced the declaration by saying, "The guardians desiring to know how to dispose of the rents, declare" so and so. I think that preface was necessary to shew the jurisdiction, and the Vice-Chancellor very properly abstained from giving any opinion as to what would be the legal rights of these parties after they

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should come of age, when, independently of the jurisdiction of the Court of Chancery, they may claim to be joint tenants or tenants in common as they think fit, or should be advised.

Upon the whole, I think the judgment of the Vice-Chancellor was perfectly correct. The decree, limited as it was, was perfectly within the province of the Court, and was quite right; and my advice to your Lordships is, that the decree of the Vice-Chancellor should be affirmed.

LORD CHELMSFORD:—

My Lords, I entirely agree with the observation, that in considering wills the ordinary meaning of words is to be adopted, unless it appears that the testator used them in a different sense. There is nothing irrational or improper in supposing that the testator intended that the sons of *Joseph Clayton Jennyns* should take estates in common. This is the primary meaning of the expressions used; and to make them create estates tail in succession would be construing the will by conjecture. Mr. *Prendergast* says the words, "beginning with the elder" penetrate and pervade the whole meaning of the testator. But if these words were in his mind, and he did not apply them to the sons of *Joseph Clayton Jennyns*, that is very strong to shew that that was not his meaning. The thing is perfectly clear, and I have no doubt whatever that the Vice-Chancellor was right.

Order appealed from, affirmed; and Appeal dismissed (1).

Solicitor for Appellant and Respondent: Messrs. *Tompson, Pickering, and Styan.*

(1) It was suggested at the Bar that this was a family suit, and that the costs would come out of the estate.

"THE MERSEY DOCKS AND HARBOUR BOARD" TRUSTEES .	PLAINTIFFS IN ERROR;	1864 *July* 4, 5, 6
WILLIAM GIBBS AND OTHERS .	DEFENDANTS IN ERROR;	1865 *June* 29, 30
AND		
"THE MERSEY DOCKS AND HARBOUR BOARD" TRUSTEES .	PLAINTIFFS IN ERROR;	1866 *Feb.* 22; *June* 5.
PENHALLOW AND OTHERS . .	DEFENDANTS IN ERROR.	

Corporation—Public Purposes—Trust Funds—Negligence—Damages—Knowledge.

The principle on which a private person, or a company, is liable for damages occasioned by the neglect of servants, applies to a corporation which has been entrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person, or the company, are not applicable to the use of the individual corporators or to that of the corporation, but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls themselves are to be proportionably diminished.

Parnaby v. *The Lancaster Canal Company* (1), which was the case of an ordinary company, approved of, and the principle of liability for negligence there established, applied to a corporate body entrusted by statute with the performance of a public duty and receiving therefrom no profits or emoluments for itself.

If knowledge of the existence of a cause of mischief makes persons responsible for the injury it occasions, they will be equally responsible when, by their culpable negligence, its existence is not known to them.

Per Lord *Westbury*—Trustees may render the property of their beneficiaries liable to third persons for acts done in the exercise of the trust.

Per Lord *Westbury*—Some of the observations of Lord *Cottenham* in *Duncan* v. *Findlater* (2), commented on and denied.

Metcalfe v. *Hetherington* (11 Ex. 257; 5 H. & N. 719) considered.

THESE were proceedings in Error on two decisions of the Court of Exchequer Chamber (3), in two cases, both of which arose out of the same circumstances. The facts were these:—In the year 1854, a ship, called the *Sierra Nevada*, sailed from *Peru*, loaded with a cargo of guano. The owners of the cargo were Messrs. *Gibbs & Co.*:

(1) 11 Ad. & E. 223. (2) 6 Cl. & F. 894.
(3) 3 H. & N. 164; 7 Id. 329.

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the owners of the ship were Messrs. *Penhallow & Co.* The vessel arrived at *Liverpool*, and proceeded to the *Wellington Dock;* one of those docks formerly under the management of the trustees of the *Liverpool Docks*, but now under the management of trustees who, by Acts of Parliament, were constituted into a corporate body, with the name of "*The Mersey Docks and Harbour Board.*" The Acts relating to these docks are numerous, and many of them are referred to in *The Mersey Docks Trustees* v. *Jones*, and *The Mersey Docks Trustees* v. *Cameron* (1). Those cases related to the liability of the docks, while in the hands of this public board, to be rated to the relief of the poor. The Acts now necessary to be referred to are the following:—The 51 Geo. 3, c. cxliii., clause 82, authorizes the harbour master and dock masters, who are appointed by the trustees, to direct the time and manner in which every ship shall be allowed to enter the docks. The 86th clause imposes a penalty on every master bringing a ship into the docks contrary to the directions of these officials.

The 6 Geo. 4, c. clxxxvii., by clause 134, empowers the trustees from time to time, as they shall see occasion, to pay out of the rates by this Act authorized to be levied, the amount of any damage occasioned by the insufficiency of the present or any future works, by this or the said [previous] Acts authorized to be established, or the amount of any damage sustained by the negligence or misconduct of any officers or servants employed by the trustees while acting under the orders and directions of the trustees. By the same Act, a committee was appointed to carry the provisions of the *Liverpool Dock Acts* into effect. Of this committee, twelve were to be appointed by the Corporation of *Liverpool*, and eight by the merchants of that port. Any resolution of the committee might be rescinded at a general monthly meeting of the trustees, otherwise it was to be final.

The trustees themselves are now appointed under the 14 & 15 Vict. c. lxiv., partly from members of the corporation, and partly from persons elected by the ratepayers; and the dock property is vested in those trustees.

The declaration in the action, at the suit of *Gibbs*, contained two counts. The first count alleged that the Plaintiffs were the

(1) 11 H. L. C. 443; 11 Jur. N.S. 746

owners of the cargo of the *Sierra Nevada;* that the said ship had arrived in the port of *Liverpool;* that the Defendants were the proprietors of a certain dock in the said port, called the *Wellington Dock,* made and constructed by them under the powers of certain Acts of Parliament; and by virtue of the said Acts they were entitled to receive port dues, &c., in respect of vessels navigating the said port; and the said dues, &c., it was their duty, under the said Acts of Parliament, to apply and dispose in and about, amongst other things, the maintaining, cleansing, supporting, and preserving the said dock, so as to be in a fit state for vessels entering into and navigating the same. Nevertheless, &c., the Defendants neglected their duty, and did not take due and reasonable, or any care, in or about the maintaining, cleansing, supporting or preserving the said dock, insomuch that the said vessel, in duly endeavouring to enter into and navigate the said dock, struck against, and became imbedded in, a large bank or mass of mud remaining, by and through the negligence of the Defendants, in and about the entrance to the said dock, and in consequence thereof was damaged, and water and mud entered the same, and damaged the said guano; and the Defendants also neglected their duty in this, that well *knowing* that the said *Wellington Dock* and the entrance thereto was, by reason of certain great accumulations of mud therein, in an unfit state to be used and navigated by vessels, they did not take due and reasonable care to put the same into a fit state for that purpose; but, on the contrary thereof, neglected, &c., and suffered, and permitted the said dock, and the entrance thereof, to be and continue, while the same was, as they well knew, and by their permission, navigated and used by such vessels, in an unfit state to be so navigated and used, for want of necessary and reasonable cleansing, insomuch, &c. that the said vessel, in endeavouring to enter the dock, became embedded in the mud, &c., and mud and water entered the vessel, and damaged the guano. The trustees pleaded—First, not guilty; secondly, that they were not the owners and proprietors of the said dock, as alleged; thirdly, that they were not entitled to receive the dues, &c., and to dispose of them, as alleged; and they also demurred to the declaration. The Plaintiffs took issue on the pleas and joined in demurrer.

The Court of Exchequer, on the authority of *Metcalfe* v.

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Hetherington (1), held the demurrer to be good and gave judgment accordingly (2), which judgment was reversed in the Exchequer Chamber (3). On the trial of the issues in fact, before Mr. Baron *Martin*, at the *Liverpool* Summer Assizes, in 1858, a verdict was found for the Plaintiffs.

The declaration in the action of *Penhallow* was in substance the same, and in that action the Defendants pleaded not guilty, and also that the Plaintiffs were not the owners of the ship as alleged. The cause was tried in *Middlesex*, before Lord Chief Baron *Pollock*, at the Michaelmas Sittings, 1859. The learned Judge's direction was, that if the cause of the injury was a bank of mud in the dock, and if the Defendants, by their servants, had the means of knowing the state of the dock, and were negligently ignorant of it, they were liable, and the verdicts must be for the Plaintiffs. A bill of exceptions was tendered to this direction, on the ground that the jurors ought to have been told that the Defendants were not liable unless they or their servants knew that the entrance was, by reason of the said mud bank, in an unfit state to be navigated, or knew that it was in a dangerous condition for ships navigating the same. The verdict having been given for the Plaintiffs, the case was argued on this bill of exceptions, and the Court of Exchequer Chamber gave judgment for the Plaintiffs (4).

Error was alleged against both these judgments. The Judges were summoned, and Mr. Baron *Channell*, Mr. Justice *Blackburn*, Mr. Justice *Keating*, Mr. Baron *Pigott*, and Mr. Justice *Shee*, attended.

Sir *F. Kelly*, Q.C., and Mr. *Mellish*, Q.C. (with whom were Mr. *Quain* and Mr. *Parker*), for the Plaintiffs in error:—

Assuming the facts to constitute negligence, which, however, is not admitted, the judgment of the Court below is erroneous. The Defendants are a public body performing a public duty, performing it under the authority of various Acts of Parliament, receiving no profit or emolument whatever from the dues payable by the ships entering the docks, and they are consequently not liable in an action like the present. They are public servants, and on the

(1) 11 Ex. 257; 5 H. & N. 719.
(2) 1 H. & N. 439.
(3) 3 H. & N. 164; 4 Jur. N.S. 368.
(4) 7 Id. 329; 8 Jur. N.S. 486.

principle on which persons filling that character have been held not to be civilly responsible for injuries arising to private individuals from acts done by persons acting under them, this action is not maintainable, and the funds in their hands, being merely trust funds, cannot be applied in payment of damages so occasioned. *Duncan* v. *Findlater* (1), and *The Feoffees of Heriot's Hospital* v. *Ross* (2), are decisive authorities on these points. If they do not perform their duties in the manner directed by the Acts under which they are appointed, an indictment may lie against them, but an action at the suit of an individual will not: *Brooke's* Abridgment (3); *Lane* v. *Cotton* (4); *Whitfield* v. *Le Despencer* (5); *Nicholson* v. *Mounsey* (6); *The Cast Plate Company* v. *Meredith* (7); *Russell* v. *The Men of Devon* (8); *Sutton* v. *Clarke* (9); all establish that principle of distinction between civil liability and public responsibility. Lord Chief Justice *Gibbs*, in *Sutton* v. *Clarke*, expressly declared that there was no civil liability in public trustees, but for acts of wilful or personal impropriety: *Harris* v. *Baker* (10), and *Hall* v. *Smith* (11), are to the same effect. Trustees of a public road have been distinctly declared not to be liable for acts done in its management unless they personally interfered therein: *Humphreys* v. *Mears* (12). In *Metcalfe* v. *Hetherington* (13), where the facts strongly resembled those of the present case, the same rule was adopted, as it had been previously in *Boulton* v. *Crowther* (14). There was not in the present case any proof of a duty existing in the Defendants to clear away the mud bank, or of any neglect on their part, either directly by themselves, or indirectly by their servants, to perform that duty. The harbour master was not for such a purpose their servant, but was an independent person liable for his own acts. In *Holliday* v. *St. Leonard's, Shoreditch* (15), where the duty of surveyor of the highways was imposed by Act of Parliament on the vestry,

(1) 6 Cl. & F. 894.
(2) 12 Cl. & F. 507.
(3) Action sur le Case, pl. 93.
(4) 1 Salk. 17.
(5) Cowp. 754.
(6) 15 East, 384.
(7) 4 T. R. 794.
(8) 2 Id. 667.
(9) 6 Taunt. 29.
(10) 4 M. & S. 27.
(11) 2 Bing. 156.
(12) 1 Man. & Ryl. 187.
(13) 11 Ex. 257.
(14) 2 B. & C. 703.
(15) 11 C. B. (N. S.) 192; 8 Jur. N.S. 79.

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and the vestry appointed a proper person to perform that duty, the vestry, which had not issued the order for a particular work, was declared not liable for an injury occasioned to a passenger by the negligence of the workmen employed by that person to execute it. In *Coe* v. *Wise* (1), all the cases were considered, and the *Commissioners of the Middle Level Drainage*, the Defendants there, being trustees for a public purpose, and acting without reward, were held not liable for the negligent conduct of the men they employed in the work. *Parnaby* v. *The Lancaster Canal Company* (2) is not in point here, for there the company was a mere private company, using its own works, and receiving the tolls from its canal for its own profit, and the decision in *The Itchin Bridge Company* v. *The Southampton Board of Health* (3) is to be accounted for by the fact that the board was made liable by the very words of its own Act. And a similar reason is applicable to the case of *Ruck* v. *Williams* (4). There is no authority for making public trustees, like these Defendants, answerable for the acts of the persons who do the actual work, who are not their servants, and from whose labours they derive no profit.

The direction of the Lord Chief Baron was wrong, and judgment ought to be given for the Defendants on the bill of exceptions. It was not enough that the Defendants might have had the means of knowledge; they ought to have been proved to have actual knowledge of the existence and of the dangerousness of the mud bank, before they could become liable in damages for alleged neglect in not removing it: *Bain* v. *The Whitehaven Railway* (5); *Anderson* v. *Fitzgerald* (6); *The Bank of Ireland* v. *Evans' Charities Trustees* (7). It was not a mere matter of law, as in *Bush* v. *Fox* (8).

The *Solicitor-General* (Sir *R. P. Collier*), and Sir *H. Cairns*, Q.C. (Mr. *Cleasby*, Q.C., Sir *G. Honyman*, and Mr. *Vernon Lushington*, were with them), for the Defendants in Error in the two cases :—

The cases which have decided that an officer of the Government

(1) 5 B. & S. 440, 10 Jur. N.S. 1019
(2) 11 Ad. & E. 223.
(3) 8 E. & B. 801, 4 Jur. N.S. 1298
(4) 3 H. & N. 308.
(5) 3 H. L. C. 1.
(6) 4 Id. 484.
(7) 5 Id. 389.
(8) Id. 707.

is not personally responsible for the acts of those employed under him, have no application to the present. They are not his servants, and are not appointed by him, or dismissible by him, except under regulations to which he is bound to submit, but are in an independent position, and have distinct duties of their own to perform. But these trustees resemble the directors of a company, and are liable for the acts and for the neglect of the persons they employ, and, like those directors, they have funds out of which to satisfy that liability. It is not sought to make the trustees personally responsible, but the funds in their hands are part of the property of the trust of which they are in occupation, and can properly be applied to the purposes of the trust. *Metcalfe* v. *Hetherington* (1), is of doubtful authority; and besides, there was not in that case any averment of the possession of funds to meet damages; whereas in this case, one of the acts constituting and regulating the board expressly makes the tolls liable for damages, and the declaration alleges the Defendants to be the owners and occupiers of the property from which those funds are derived. In addition to all this, the Judges there expressed a clear opinion, that no act of negligence had been established against the trustees. The negligence here is established by the finding of the jury. It is clear that a trading company would be liable in such a case. These trustees are said not to be liable because they are a public corporation. But a corporation may be a trading company and be liable: *Scott* v. *The Mayor and Corporation of Manchester* (2). Though the commissioners or trustees may be performing a duty for the benefit of the public, and without obtaining therefrom any emolument or profit, there is nothing in that fact which should deprive a person injured by their acts or neglect, of his right to compensation: *Ruck* v. *Williams* (3). It was long ago held in this House, that under such circumstances an individual might maintain an action against a corporation: *The Mayor of Lyme Regis* v. *Henley* (4).

[LORD CRANWORTH:—The corporation there held property on the condition of performing the duty.]

Public commissioners have been held answerable in several

(1) 11 Ex. 257; 5 H. & N. 719.
(2) 1 H. & N. 59; 2 Id. 204.
(3) 3 H. & N. 308.
(4) 2 Cl. & F. 331.

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cases: *Sutton* v. *Clarke* (1), declared that principle, though in that case there was no act of neglect or misfeasance by the trustees themselves. The same fact must be taken to explain the *Cast Plate Glass Company* v. *Meredith* (2). What the commissioners there did was within their statutory jurisdiction, which cannot be said of an act of negligence. There is no doubt that it is their duty to perform the work imposed on them by the Act of the Legislature: *Jones* v. *Bird* (3); and *Harris* v. *Baker* (4), admitted the same principle, but there it was said that the action was not maintainable, because no right of action was given by the particular Act of Parliament. In *Hall* v. *Smith* (5), the surveyor and contractor were treated as persons entirely independent of the commissioners; but Chief Justice *Best* there said, that if they themselves were guilty of negligence, they would be liable to an action: *Holliday* v. *St. Leonard's, Shoreditch* (6), is likewise explained by the fact, that the surveyor was treated as a person entirely independent of the vestry, for otherwise it is clear that it would have been held liable: *Whitehouse* v. *Fellowes* (7); *Cowley* v. *The Mayor of Sunderland* (8); *The Itchin Bridge Company* v. *The Southampton Board of Health* (9); and *Coe* v. *Wise* (10); are all cases to shew that when public commissioners have a duty to perform, they are liable for neglect in the mode of performing it. *Parnaby* v. *The Lancaster Canal Company* (11), establishes such a liability as against a company, not on the ground of the particular words of the company's Act, but on the principles of the common law, and declares that the owners of a canal taking tolls for the navigation, are bound to use reasonable care in making the navigation secure, and that the neglect to use that reasonable care made them liable in damages to the person injured thereby. Those principles are not affected by the circumstance, that the persons owning the property, and receiving tolls from it, do not apply those tolls to their own benefit. The cases of *Duncan* v. *Findlater* (12) and *The Feoffees of Heriot's Hospital*

(1) 6 Taunt. 29.
(2) 4 T. R. 794.
(3) 5 B & A. 837.
(4) 4 M. & S. 27.
(5) 2 Bing. 156.
(6) 11 C. B. (N. S.) 192; 9 Jur. N. S. 79
(7) 10 C. B. (N. S.) 765.
(8) 6 H. & N. 565.
(9) 8 E. & B. 801; 4 Jur. N. S. 1298
(10) 5 B. & S. 440; 10 Jur. N. S. 1019
(11) 11 Ad. & E. 223.
(12) 6 Cl. & F. 894.

v. *Ross* (1), do not apply here, for the first proceeded on the construction of particular words in an Act of Parliament, and the other on the absence of any authority in the Scotch law to make trust funds liable in a case of that kind, for the acts of the trustees administering the fund. There is no such absence of authority in English law; and as to *Duncan* v. *Findlater*, though the decision itself may not be impeached, some of the observations of Lord *Cottenham* are open to question.

The bill of exceptions here cannot be sustained. The declaration alleged knowledge, the evidence shewed that the means of knowledge were fully within the power of the Defendants. If they neglected to avail themselves of those means, they rendered themselves liable for any consequences that might thereby occur.

Mr. *Mellish* in reply:—

Public trustees could only be made liable for their wilful default. There was no such default here. They appointed proper officers to do the work, and, having done so, their liability was at an end. *Holliday* v. *St. Leonard's, Shoreditch* (2), and the funds in their hands were not chargeable: *Duncan* v. *Findlater* (3), and *The Feoffees of Heriot's Hospital* v. *Ross* (4).

The direction was erroneous. Having the means of knowledge, and having actual knowledge, cannot be treated as the same thing, especially in the case of public trustees, who employ proper persons to do the work, and who do not receive from it any profit whatever. There was nothing here on the face of the bill of exceptions to shew negligence, either by the trustees themselves, or by them through their servants.

THE LORD CHANCELLOR (Lord *Westbury*) moved that the following questions be put to the Judges:—

In the case of the *Mersey Docks Trustees* v. *Gibbs*: "Does the declaration in this case state a good cause of action?"

In the case of the *Mersey Docks Trustees* v. *Penhallows*: "Is the judgment of the Court of Exchequer Chamber right?"

(1) 12 Cl. & F. 507.
(2) 11 C. B. (N. S.) 192.
(3) 6 Cl. & F. 894.
(4) 2 Id. 507.

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MR. BARON CHANNELL requested time for the Judges to answer those questions.

Ordered.

MR. JUSTICE BLACKBURN:—

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My Lords, I have the honour, in answer to your Lordships' questions in these cases, to deliver the joint opinion of all the Judges who heard the argument.

The two actions before your Lordships, though arising out of the same transaction, do not come before your Lordships' House in precisely the same manner. In *Gibbs* v. *The Mersey Board* (the action by the owner of the cargo) the question is raised by a demurrer to the declaration, on which all the material averments must be considered as admitted to be true. The damages are assessed on the second count, and it is to the averments on that count that your Lordships' attention should be directed. On this record it is admitted by the demurrer that the Defendants, the trustees of the docks, *knowing* that the dock and its entrance was, by reason of accumulations of mud, unfit to be used by ships, did not take due and reasonable, or any care, to put it in a fit state, but *negligently suffered* the dock to remain in such unfit state, whilst, as they well knew, it was used by vessels, and that the damage arose in consequence.

In the action of *Penhallow* v. *The Mersey Board* (the action by the shipowner), the averments in the second count are similar to those in the first action; but they are not admitted by a demurrer. The question was raised at *nisi prius* on the plea of not guilty, which the jury found for the Plaintiffs; but the charge of the Lord Chief Baron is brought before your Lordships by a bill of exceptions, by which it appears that he told the jurors that if, in their opinion, the cause of the misfortune was a bank of mud, "and the Defendants, by their servants, had the means of knowing the state of the dock, and were negligently ignorant of it, then, in his opinion, the Defendants were liable;" obviously meaning that if the jurors so thought they ought to find the issue for the Plaintiffs. The exception taken to this summing-up was, that even if the jury thought the cause of the misfortune was a bank of mud, the Defendants were not liable unless they *knew* that the dock and

entrance were, by reason of the said mud bank or otherwise, unfit for navigation. That is the only exception.

Mr. *Mellish*, in the course of his very able reply at your Lordships' bar, contended that the statement in the bill of exceptions disclosed no evidence to go to the jury, of negligence on the part of the Defendants or their servants. But that is not the exception on the record; and we need hardly remind your Lordships that the party tendering a bill of exceptions is confined to the exceptions he makes at the trial. This is not a merely technical answer; had the exception been that there was no evidence of negligent ignorance fit to be left to the jury, the whole of the evidence bearing on that point would have been set out on the record, and then the Court of Error could have formed a judgment whether it was sufficient or not; as it is, the record contains no more of the evidence than is necessary to explain the exception really made at the trial, viz., that the Chief Baron told the jury, in effect, that it was not necessary to prove *knowledge* on the part of the Defendants or their servants of the unfit state of the docks, and that proof that the Defendants, *by their servants*, had the means of knowledge and were negligently ignorant of it, would entitle the Plaintiffs to the verdict.

The Court of Exchequer Chamber based the judgment in each of the cases on that of the Court of Exchequer Chamber in *The Lancaster Canal Company* v. *Parnaby* (1). In that case the Defendants were a company incorporated by Act of Parliament for the purpose of making and maintaining a canal, to be open for the use of the public on payment of rates, which the Defendants were empowered to receive for their own proper use and behoof (*i.e.*, to be divided amongst the shareholders). And the Court of Exchequer Chamber, in that case, stated the law thus (2): "The facts stated in the inducement show that the company made the canal *for their profit*, and opened it to the public upon payment of tolls to the company; and the common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property."

(1) 11 Ad. & E. 223. (2) Id. 242.

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In the present cases the trustees do not receive the dock rates for their own use and behoof, *i.e.*, to be divided amongst themselves or their shareholders; but they are bound by the statutes, under which they are incorporated, to apply them to the purposes of the Acts, which may in substance be stated to maintain the docks and pay the very large debt contracted in making them.

The Court of Exchequer Chamber, in both cases, decided that this difference did not affect the question; that so long as the dock was kept open for the public, the duty to take reasonable care that the dock and its entrance were in such a state that those who navigate it may do so without danger, was equally cast on the persons having the receipt of the tolls and the possession and management of the dock, whether the tolls were received for a beneficial or a fiduciary purpose.

If this proposition is correct, the direction of the Lord Chief Baron excepted to was right, for a body corporate never can either take care or neglect to take care, except through its servants; and (assuming it was the duty of these trustees to take reasonable care that the dock was in a fit state), it seems clear that if they, by their servants, had the means of knowing that the dock was in an unfit state, and were negligently ignorant of its state, they did neglect this duty, and did not take reasonable care that it was fit. And after hearing the very able arguments at your Lordships' bar, we are of opinion that the judgment of the Court of Exchequer Chamber was correct.

It is pointed out by Lord *Campbell* in *The Southampton and Itchin Bridge* v. *The Southampton Local Board* (1), that in every case the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created. It is desirable, therefore, in the first place, to state what was the effect of the legislation, so far as it applied to these docks, at the time of the accident of the 12th of April, 1855.

The docks in *Liverpool* have been made at different times, under a great many different Acts of Parliament, the earliest being the 8 Anne, c. 12. At the time when the mischief happened which gave rise to these actions, the latest of the Acts was the 14 & 15 Vict. c. lxiv. All these numerous statutes are public Acts, of which

(1) 8 E. & B. 801, 812; 4 Jur. N.S. 1298.

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the Courts may take judicial notice; and as many of the statutes were at that time still in force, though their provisions had been in many respects varied by those subsequently passed, it is extremely difficult to ascertain with precision what was, at the time of the accident, the exact state of the legislation peculiar to those docks. But having had the assistance afforded by the able and industrious Counsel who argued at your Lordships' bar, we think we may venture to say that the effect of the material parts of the statutes is the following:—

The members of the Town Council of *Liverpool* and their successors were formed into a corporation by the style of "*The Trustees of the Liverpool Docks.*" By statutes 51 Geo. 3, c. cxliii. s. 2; 6 Geo. 4, c. lxxxvii. s. 3; and 14 & 15 Vict. c. lxiv. ss. 2, 3, and 4, the powers of this corporation were to be exercised by a committee. On this Mr. *Mellish* founded an argument, which we shall notice afterwards. Subject to these provisions we may say that the effect of the legislation was, that the dock trustees were empowered to make and maintain docks and warehouses, which were to be open to the use of the public, paying dock rates for the use of the docks, and warehouse rates for the use of the warehouses. The same accommodation and the same services were to be supplied to those using the docks and the warehouses respectively that would have been supplied by any ordinary dock and warehouse proprietors to their customers. Powers are given to the trustees of the *Liverpool Docks* from time to time to close the docks for the purpose of cleansing and repair. General powers are given to them to appoint officers and servants; but the duties of those officers and servants are not in any place defined in the statutes, except by statute 51 Geo. 3, c. cxliii. ss. 80, 81, 82, 84, 85, and 86. By those sections the water-bailiff or harbour-master, or any one of the dock-masters, has power to remove wrecks and obstructions, and to regulate the time and manner in which vessels shall enter and leave the docks; and penalties are imposed on those who disobey the orders of those officers.

On these latter sections, and on the decision of the Court of Exchequer in *Metcalfe* v. *Hetherington* (1), an argument was raised for the Defendants, which we will notice afterwards. At present

(1) 11 Ex. 257; 5 H. & N. 719.

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we will only observe that such powers are almost essential for the due use of any dock; and that, accordingly, it has been for many years the practice to insert similar clauses in all harbour and dock Acts, whether for private companies or public bodies. And in the *Harbour, Docks, and Pier Clauses Act*, 1847 (10 Vict. c. 27), the clauses commonly in use are collected under the head "and with respect to the appointment of harbour-masters and pier-masters and their duties." It will be found, on examining them, that section 56 in the General Act is equivalent to section 80 in the 51 Geo. 3. c. cxliii.; and that the other powers given to the officers of the *Liverpool Dock Trustees* are also given to the officers of all dock companies, whether created for public or for private purposes, and incorporated by any particular Acts, or incorporated by the *Harbours, Docks, and Piers Clauses Act*, 1847 (10 & 11 Vict. c. 27).

By a general appropriation clause, 51 Geo. 3, c. cxliii., s. 29, all the revenues of the trustees of the *Liverpool Docks* are to be applied in the first instance to making and maintaining the docks, paying the interest on the large debt secured on the dock rates, and to paying "all the charges and expenses already incurred, or hereafter to be incurred, in the carrying into execution, or under or in consequence of, any of the former Acts or this present Act; and the residue in paying off the principal moneys of the debt." And when it is all paid off, the trustees are required to lower and reduce the rates, "as far as can be done, leaving sufficient for defraying all charges of management and other concerns of the docks, &c., and improving, repairing, and maintaining the same, and for the carrying into execution the provisions of this Act and the former Acts."

By subsequent enactments the trustees of the *Liverpool Docks* are enabled to raise much more money on bonds, and to make much more extensive works; but in substance this clause still, at the time of the accident, remained the clause governing the appropriation of all monies received by the trustees of the *Liverpool Docks*, including the monies paid for the use of the docks and the warehouses.

There are some peculiar enactments in one of the statutes (6 Geo. 4, c. clxxxvii. ss. 130 to 136), which were relied upon as shewing

the intention of the Legislature, on which we shall remark afterwards; but, with this exception, there is nothing in the statutes either extending or limiting the liability of the dock trustees to those paying for the use of the docks, so as to make it different from that which the general law would cast upon them under such circumstances. And, consequently, in our opinion the great question in both these actions is, what is the duty which the general law does cast upon corporate trustees, being the proprietors of docks maintained under such enactments.

Now, it is obvious that a shipowner who pays dock rates for the use of the dock, or the owner of goods who pays warehouse rates for the use of a warehouse and the services of the warehousemen, is, as far as he is concerned, exactly in the same position, however the rates may be appropriated. He pays the rates for the dock accommodation, or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid.

It is well observed by Mr. Justice *Mellor*, in *Coe* v. *Wise* (1), of corporations like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise. And we think that in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the Legislature, the true rule of construction is, that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works. If, indeed, the Legislature has, by express enactment or necessary intendment, enacted that they shall not be subject to such a liability, there is an end of the question; and if the Legislature had, in the Acts now under consideration, enacted that none of the revenue of the trustees of the *Liverpool Docks* should be applied to the purpose of discharging liabilities incurred in consequence of the trustees acting as proprietors of docks and warehouses, it would go far to shew that the Legislature intended that they should not be so liable. But the

(1) 5 B. & S. 440; 4 New Rep. 354; 10 Jur. N.S. 1019

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appropriation clause in the Acts now under consideration has no such effect. It was, indeed, supposed by the Court of King's Bench in *Rex* v. *Liverpool* (1), that its effect was to prohibit the payment of poor rates; but your Lordships' House has decided, in the recent case of *Jones* v. *Mersey Board* (2), that this was a mistake, and that the trustees of the *Liverpool Docks* were out of that fund to defray all expenses incident by law to the existence of the docks, and, as such, poor rates. We think, on the same principle, they are at liberty to apply the fund to the discharge of the liabilities which in execution of the Act, by keeping open the docks and warehouses, they must from time to time incur to their customers.

It was pointed out, in the course of Mr. *Mellish's* argument, that the effect of applying the revenue of the trustees of the *Liverpool Docks* to the payment of such a liability as the present, would be to postpone the time at which the rates would be reduced, and that consequently the ultimate loss would fall on those who were payers of the rates at the time when the rates, but for this liability, would have been reduced, and so that, in the possible, but not very probable, event of the Plaintiffs being then still persons using the docks, the loss would partly fall upon the Plaintiffs themselves. But we are unable to see how that affects the question, whether the action would lie or not? A shareholder in an incorporated company, such as a railway company, or an ordinary dock company, who has a cause of action against the corporation, does in effect, by obtaining redress, diminish the future dividends of the shareholders, including his own. In this respect his position is analogous to that of the ratepayer, yet it never can be contended, that a shareholder in an incorporated dock company could not maintain an action for an injury to his ship from the neglect of the company.

It was pointed out by Sir *Hugh Cairns*, in the course of his argument at your Lordships' bar, that the Legislature in the 6 Geo. 4, c. clxxxvii. ss. 130 to 136, shewed a clear intention that the funds of the dock trust might, in some cases at least, be applied by the committee to indemnifying parties who had suffered by the negligence of the servants of the trustees of the *Liverpool Docks*; and also that damages recovered against the trustees of the *Liverpool Docks*, might be levied out of the rates, by the circuitous and

(1) 7 B. & C. 61.

(2) 11 H. L. C. 443, 11 Jur. N.S. 746

somewhat clumsy process of distraining on the goods of the treasurer, who was to repay himself out of the rates. And these enactments, so far as they go, seem to us to shew that the Legislature at least did not intend to take away any liability of the trustees, which would otherwise have been cast on them by the general law, though we should not willingly infer from them, that it was intended to impose any liability beyond that which would be imposed by the general law.

Mr. *Mellish* also founded an argument on the wording of these sections, taken in conjunction with the enactments in the 2nd clause of 51 Geo. 3, c. cxliii., and the 2nd, 3rd, and 4th clauses of the 14 & 15 Vict. c. lxiv., which it is proper we should now notice.

The trustees of the *Liverpool Docks* were required by the 2nd section of 51 Geo 3, c. cxliii., to appoint a committee of their body, and all their powers were to be exercised by that committee, except in so far as the trustees of the docks might reserve any question for their own determination. By the subsequent enactments, this committee was to consist partly of the members of the trustees of the *Liverpool Docks* and partly of members elected by the persons who had paid dock rates, and the whole of the powers of the trustees of the *Liverpool Docks* were to be exercised exclusively by this committee so constituted.

When the demurrer in the case of *Gibbs* v. *The Trustees of the Liverpool Docks* was argued in the Court of Exchequer, that Court gave judgment upon the ground that the action, if it lay at all, lay against the committee, and not against the trustees of the *Liverpool Docks* (1). But in the Court of Error, the Defendants, by their counsel, very handsomely agreed that the Plaintiff should not be put to the expense and trouble of issuing another writ against the committee; but that, if the action would lie against either body, judgment might be given against the Defendants on the record. Subsequent legislation has done away with the committee, and the question whether the writ ought in such a case to have been directed against the one body or the other can never in future arise.

Your Lordships will probably agree with the Court of Exchequer Chamber that this arrangement was one which ought not to be

(1) 1 H. & N. 439.

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disturbed by the Court, and there has been no attempt on the part of the counsel for the *Mersey Board* (who now represent both the original Defendants and the committee) to depart from the agreement.

But Mr. *Mellish* argued that the whole scheme of the Legislature shewed that the intention of the Legislature was to give to the committee an uncontrolled discretionary power to compensate such persons as, in their opinion, ought to be compensated, and no others. He did not say the committee was to exercise this power capriciously, but *quasi* judicially, though without appeal; and he argued that the change of the constitution of the committee, by which one-half was to be elected by the ratepayers (though only introduced by the later Acts), rendered this less unlikely.

But we do not think that such is the fair construction to be put on the enactments.

46 L.J.C.P. 124

It is contrary to the general rule of law, not only in this country, but in every other, to make a person judge in his own cause, and though the Legislature can, and, no doubt, in a proper case would, depart from that general rule, an intention to do so is not to be inferred except from much clearer enactments than any to be found in these statutes.

We have gone through these enactments, and we think your Lordships will hardly be inclined to dispose of this important case on any of the special provisions peculiar to these Acts. As we have already intimated, in our opinion the proper rule of construction of such statutes is that, in the absence of something to shew a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things. This rule of construction was not admitted by the trustees. They did not rest their case exclusively, or even mainly, on any special provisions peculiar to their own private legislation, but upon broader grounds, which, if we do not mistake them, were in effect two.

They said that by the general law of this country, bodies such as the present are trustees for public purposes, and that being such, they are not in their corporate capacity liable to make com-

pensation for damages sustained by individuals from the neglect of their servants and agents to perform the duties imposed on the corporation, or, at all events, that the duty of such corporations was limited to that of exercising due care in the choice of their officers, and that if they had properly selected their officers, any evil which ensued must be the fault of the officer, and that redress for it must be sought against him alone.

A great many cases were cited at your Lordships' bar as supporting this position, many of which are really not applicable to such a case as the present. *Lane* v. *Cotton* (1), and *Whitfield* v. *Le Despencer* (2) (the cases of the Postmaster-General); and *Nicholson* v. *Mounsey* (3) (the case of the captain of the man-of-war); are authorities that where a person is a public officer in the sense that he is a servant of the government, and as such has the management of some branch of the government business, he is not responsible for any negligence or default of those in the same employment as himself.

But these cases were decided upon the ground that the government was the principal, and the Defendant merely the servant. If an action were brought by the owner of goods against the manager of the goods traffic of a railway company for some injury sustained on the line, it would fail unless it could be shewn that the particular acts which occasioned the damage were done by his orders or directions; for the action must be brought either against the principal, or against the immediate actors in the wrong (4). And all that is decided by this class of cases is, that the liability of a servant of the public is no greater than that of the servant of any other principal, though the recourse against the principal, the public, cannot be by an action. The principle is the same as that on which the surveyor of the highways is not responsible to a person sustaining injury from the parish ways being out of repair, though no action can be brought against his principals, the inhabitants of of the parish. But the Defendants in the present action are not servants of the public in that sense. For this we need do no more than refer to the recent decision of your Lordships' House in *Jones* v. *Mersey Board*, where they were held to be rateable as

6 Q.B. 215.

(1) 1 Ld. Raym. 646.
(2) Cowp. 754.
(3) 15 East, 384.
(4) Story on Agency, s. 313.

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4 Ch 164
4 QBD 442

occupiers of the docks on the very ground that they did not occupy as servants of the public or government.

Another class of cases, also cited, depends upon the following principle. If the Legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorizing the doing of such things. But no action lies for what is *damnum sine injuriâ*; the remedy is to apply for compensation under the provision of the statutes legalizing what would otherwise be a wrong. This, however, is the case, whether the thing is authorized for a public purpose or a private profit. No action will lie against a railway company for erecting a line of railway authorized by its Acts, so long as the directors pursue the authority given them, any more than it would lie against the trustees of a turnpike road for making their road under their Acts; though the one road is made for the profit of the shareholders in the company and the other is not. The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the Legislature: *Rex* v. *Pease* (1). This, we think, is the point decided in *The Governors of the British Cast Plate Manufacturers* v. *Meredith* (2), *Sutton* v. *Clarke* (3), and several other cases, as is well explained by Mr. Justice *Williams* in *Whitehouse* v. *Fellowes* (4).

But though the Legislature has authorized the execution of the works, it does not thereby exempt those authorized to make them from the obligation to use reasonable care that in making them no unnecessary damage be done. In *Brine* v. *The Great Western Railway Company* (5), Mr. Justice *Crompton* says, "the distinction is now clearly established between damage from works authorized by statutes, where the party generally is to have compensation, and the authority is a bar to an action, and damage by reason of the works being negligently done, as to which the owner's remedy by way of action remains."

This distinction is as applicable to works executed for one pur-

(1) 4 B. & Ad. 30.
(2) 4 T. R. 794.
(3) 6 Taunt. 29.
(4) 10 C. B. (N. S.) 779.
(5) 2 B. & S. 402; 8 Jur. N. S. 410, 412.

pose as for another. This principle seems to have been that acted upon in *Leader* v. *Moxon* (1), and it is to some extent recognized, in *Sutton* v. *Clarke* (2), by Chief Justice *Gibbs*, who puts the judgment on the ground that the Defendant, in the execution of a duty imposed on him by the Legislature, had exercised his best skill, diligence, and caution in the execution of it. "We are of opinion," says Chief Justice *Gibbs*, "that he is not liable for an injury which he did not only not foresee, but could not foresee. He has done all that is incumbent on him, having used his best skill and diligence." This certainly implies that, in the opinion of those who concurred in that judgment, the Defendant would have been liable if he had neglected to use his best skill and diligence.

In the subsequent case of *Jones* v. *Bird* (3), Justice *Bayley* laid down a stricter rule. He said that the Defendants, who in that case were the persons actually executing a sewer, authorized by statute, were not protected merely because acting *bonâ fide* and to the best of their skill and judgment: "That," says he, "is not enough, they are bound to conduct themselves in a skilful manner, and the question was most properly left to the jury to say whether the Defendants had done all that any skilful person could reasonably be required to do in such a case." And there is a considerable number of cases, to which we shall afterwards refer, in which, on this principle, actions have been held to lie against bodies executing works under the authority of statutes for the improper mode in which their powers have been executed, though the Defendants did not derive any profit from the execution of the works.

There are, however, authorities that bear the other way upon this part of the case; and it is necessary to examine these authorities in order to contrast them with the others. It will be for your Lordships then to decide on which side the preponderance of authority lies. Those in favour of the Defendant are *Hall* v. *Smith* (4); *Duncan* v. *Findlater* (5); *Holliday* v. *St. Leonard's, Shoreditch* (6); and *Metcalfe* v. *Hetherington* (7).

(1) 3 Wils. 461; Sir W. Bl. 924.
(2) 6 Taunt. 29.
(3) 5 B. & A. 837.
(4) 2 Bing. 156.
(5) 6 Cl. & F. 894.
(6) 11 C. B. (N. S.) 192.
(7) 11 Ex. 257.

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It is necessary, in considering these authorities, to bear in mind the distinction between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation on him to perform, and the liability for the negligence of those who are employed in the work.

1 CPD. 486 492-4

This distinction is well stated in *Pickard* v. *Smith* (1), by Mr. Justice *Williams*, who says, "Unquestionably no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work, he or his servants commit some casual act of wrong or negligence, the employer is not answerable. That rule, however, is inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." "If the performance of the duty be omitted, the fact of his having entrusted it to a person who also neglected it, furnishes no excuse either in good sense or law."

Liability for the collateral negligence depends entirely upon the existence of the relation of master and servant between the employer and the person actually in default, according to the well-known exposition of the law in *Quarman* v. *Bennett* (2), where Mr. Baron *Parke* says, "Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrongdoer, he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. But the liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist."

(1) 10 C. B. (N. S.) 480. (2) 6 M. & W. 509.

In such a case as the present, the liability does not depend on that relation. Liability for doing an improper act depends upon the order given to do that thing; and the liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done; and in the last two cases it is quite immaterial whether the actual actors are servants or not.

2 P.C. 197
1 C.P.D. 494.

Now, in *Hall* v. *Smith* (1), the action was brought against the *Commissioners for paving Birmingham* (sued by their clerk), *Norton*, a surveyor, and *Kimberley*, a contractor, employed by them to make a sewer, for leaving a quantity of rubbish unguarded and unlighted, whereby the Plaintiff was thrown down and injured. The commissioners were authorized by an Act of Parliament to order the making of the sewer. "No negligence," says Lord Chief Justice *Best*, "was imputed to the commissioners themselves; they had ordered the tunnel to be made, and left the making of it to the Defendants, *Norton* and *Kimberley*, the former of whom was the surveyor, and the latter the undertaker of the work. The accident happened to the Plaintiff from these persons not putting up rails, and not having lights during the night." The close of his judgment is, that "No action can be maintained against a man acting *gratuitously for the public* for the consequence of any act which he is authorized to do, and which, so far as he is concerned, is done with due care and attention; and that such a person is not answerable for the negligent execution of an order properly given."

This, no doubt, is true; but it would be equally true if the Defendants, instead of being a body acting gratuitously for the public, had been a body, like railway directors, authorized to make the tunnel for their own profit. No action could have lain against them unless they stood in the relation of master to the parties actually guilty of negligence. This was not noticed by Chief Justice *Best*, as is pointed out in *Scott* v. *Mayor of Manchester* (2). There, Mr. Baron *Alderson* says, "*Hall* v. *Smith* goes too far,—the person who selects the workmen is the party liable. Commissioners may get rid of liability by making contracts, but if they employ their own servants to do the work, they will be liable for

(1) 2 Bing. 156. (2) 1 H. & N. 59.

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the acts of such servants." But, he adds, "*Hall* v. *Smith* was rightly decided upon the facts."

But though what Chief Justice *Best* said in *Hall* v. *Smith* was irrelevant, and therefore of less weight, still his opinion is an authority in favour of the Defendants. It is, however, based upon a ground quite inapplicable to the present, or indeed to any modern case. He points out, clearly and forcibly, that it is harsh and impolitic to cast on individuals, acting gratuitously, a public duty, and make them responsible out of their private means for the non-fulfilment of it. But for many years it has been the practice of the Legislature to exempt the private means of commissioners from liability, either, as in the present series of Acts, by incorporating them, or by enabling them to sue and be sued in the name of a clerk, and restricting the execution to the property which they hold as commissioners. The basis of Chief Justice *Best's* reasoning fails, and *debile fundamentum fallit opus.*

Duncan v. *Findlater* (1) was a Scotch appeal brought before the House of Lords on a bill of exceptions. The action was against the trustees of a turnpike road, to recover damages for an injury sustained by the Plaintiff from falling over a heap of stones negligently left on the road. It was stated in the bill of exceptions, that the trustees had given directions, through their surveyor, that a drain should be filled up, and that the workmen engaged in filling up the drain left negligently the stones in the road. Assuming that the law of *Scotland* and of *England* are the same, it is clear that no one could be answerable for this sort of negligence, unless he stood to those who actually were guilty of the negligence in the relation of master and servant. The Judge who presided at the trial took a different view of the law of *Scotland,* and directed the jury "that road trustees on a public road, are liable for any injury which may happen to passengers, in consequence of the negligence or improper conduct of labourers or surveyors, or other persons employed by the trustees, or by the officers of the trustees, when engaged in any operation performed under the authority of the trustees." And to this direction there was an exception. If the body authorizing the operation had been a railway company, or a private individual, instead of

(1) 6 Cl. & F. 894.

being trustees of a turnpike road, this direction would, according to English law, have been wrong; and this is pointed out by Lord *Brougham*, who says, "The rule of liability and its reason I take to be this, I am liable for what is done by me and under my orders by the man I employ, for I may turn him off from that employ when I please. And the reason I am liable is this, that by employing him I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it." Language which is very similar to that already cited from *Quarman* v. *Barnett*.

But though all that really was decided in that case was, that the trustees were not liable for the negligence of persons in their employment, who were not shewn to be their servants, it is not to be disputed that Lord *Cottenham's* language goes a great deal farther, and shews that, in his opinion, persons incorporated for the purpose of executing works, could never in their official or corporate capacity be liable to damages at all, the remedy for any wrong or neglect being only against the individual corporators for their individual wrong or neglect. His reasoning on this point is, "If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it. And this is clear, on the legal presumption that the act creating the damage, being within the statute, must be a lawful act. On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers conferred on him by statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct." Lord *Cottenham* is there speaking of a body of trustees acting under the *Scotch Turnpike Act*, but his reasoning is general. And the dilemma, if a good one, is applicable to all cases. This is, no doubt, a very high authority, being said by the Lord Chancellor in the House of Lords, though in a Scotch case, but not being the point decided by the House, it is not conclusively binding, and we think that, with great deference to his high authority, we must dissent from the position there laid down, both on principle and on the preponderance of authority.

It is pointed out by Lord *Campbell* in *The Southampton and*

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Itchin Bridge Company v. *The Southampton Local Board of Health* (1), that in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created. And if the true interpretation of the statutes is, that a duty is cast upon the incorporated body, not only to make the works authorized, but also to take proper care, and use reasonable skill, that the works are such as the statute authorizes, or, as in the present case, to take reasonable care that they are in a fit state for the use of the public who use them, there is, with great deference to Lord *Cottenham*, nothing illogical or inconsistent in holding that those injured by the neglect of the statutable body to fulfil the duty thus cast by the statute upon it, may maintain an action against that body, and be indemnified out of the funds vested in it by the statute.

Accordingly the Court of Queen's Bench, in *Ward* v. *Lee* (2), and the Court of Common Pleas, in *Clothier* v. *Webster* (3), have expressed the opinion that an action lay against a local board of health, in its corporate capacity, for an injury sustained from making improper works. And in *The Southampton and Itchin Bridge Company* v. *Southampton Local Board*, the point was expressly decided. And this decision was followed and approved of by the Court of Exchequer, in *Ruck* v. *Williams* (4), where it was held that an action would lie against the *Improvement Commissioners of Cheltenham* (sued by their clerk) for the improper mode in which they caused a sewer to be made. And Mr. Baron *Bramwell* forcibly observed, "I can well understand if a person undertakes the office or duty of a commissioner, and there are no means of indemnifying him against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that if one of several commissioners does something not within the scope of his authority, the commissioners, as a body, are not liable; but where commissioners, who are a *quasi* corporate body, are not affected (*i.e.* personally) by the result of an action, inasmuch as they are authorized by Act of Parliament to raise a fund for payment of the damages, on what principle is it that if an individual member of the public suffers

(1) 8 E & B. 801; 4 Jur. N.S. 1298
(2) 7 E. & B. 426; 3 Jur. N.S. 867
(3) 12 C. B. (N. S.) 790. 9 Jur. N.S. 231
(4) 3 H. & N. 308.

from an act *bonâ fide* but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law."

In *Whitehouse* v. *Fellows* (1), the Court of Common Pleas decided that an action lay against the trustees of a turnpike road sued in their *quasi* corporate capacity by their clerk, for negligence in the manner in which they had caused drains to be made. This decision, it is hardly necessary to point out, though quite consistent with all that was decided by the House of Lords in *Duncan* v. *Findlater*, is directly opposed to the opinion of Lord *Cottenham*.

And lastly, in *Brownlow* v. *Metropolitan Board* (2) it was decided that an action lay against the *Metropolitan Board* for the injury sustained by a shipowner for the improper construction of a sewer in the bed of the *Thames*. And this decision was affirmed by the Court of Exchequer Chamber (3).

It must rest with your Lordships to say whether those decisions, to which we have referred, are to be over-ruled. We think they are not consistent with Lord *Cottenham's* opinion.

Before leaving this part of the subject we ought to call your Lordships' attention more particularly to the case of *Holliday* v. *St. Leonard's, Shoreditch* (4). The point actually decided there was, that there is an exception from the general law making a master liable for the negligence of his servant, where the servant is employed by a public body. The Judges of the Court of Common Pleas did not intend to decide anything inconsistent with the decisions of the Court of Exchequer Chamber now at your Lordships' bar, or with their own decision in *Whitehouse* v. *Fellowes* (5). And the point which they did decide does not arise in the present case, so that it is unnecessary directly to decide anything upon it. But we think that we ought to call your Lordships' attention to the case, as much of what was said in the course of the judgment by Lord Chief Justice *Erle* is based upon the opinion of Lord *Cottenham* in *Duncan* v. *Findlater*, and is, therefore, an authority making against the view we have submitted to your Lordships.

(1) 10 C. B. (N. S.) 765.
(2) 13 Id. 768; 8 Jur. N. S. 891
(3) 16 Id. 546.
(4) 11 C. B. (N. S.) 192; 8 Jur. N. S. 79.
(5) 10 Id. 765.

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There remains only one further point to consider. The Acts under which the *Liverpool Docks* have been made contain, as has been already mentioned, clauses enabling the trustees of the docks to appoint water-bailiffs and harbour-masters, and confers on those officers powers of regulating the manner in which vessels shall enter the docks, &c. It was argued that the effect of these clauses was to confine the duty of the trustees to that of selecting proper officers, and that they could not be responsible further.

The case of *Metcalfe* v. *Hetherington* (1) was cited as an authority for this position, and we think it is a decision much in point. The Court of Exchequer there, in construing the *Maryport Harbour Act*, attributed this effect to enactments not very dissimilar to those now in question, and we agree, if this was so, the consequence would follow that the Plaintiffs' remedy would be, not against those who appointed the officer, but only against the officer himself. But we cannot agree in so construing the present Acts. As has been already pointed out (2), clauses almost identical with those now in question are inserted in every harbour and dock Act, whether the docks be, as in the present case, the property of public commissioners, or of a trading company. And we cannot think that it was the intention of the Legislature to deprive a shipowner who pays dues to a wealthy trading company, such as the *St. Catherine's Dock Company*, for instance, of all recourse against it, and to substitute the personal liability of a harbour-master, no doubt a respectable person in his way, but whose whole means, generally speaking, would not be equal to more than a very small per centage of the damages, when there are any.

If these enactments are, in the present case, so construed as to relieve the *Mersey Board* from liability, the corresponding enactments in the *Harbours, Piers, and Docks Clauses Act*, 1847, must also be so construed as to relieve all trading dock companies from liability, and that we think a *reductio ad absurdum*. This was not brought to the notice of the Court of Exchequer when deciding *Metcalfe* v. *Hetherington*. With the greatest respect for those who joined in that decision, we think it was erroneous.

(1) 11 Ex. 257. (2) *Ante*, p. 104, *et seq.*

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For these reasons, we answer both your Lordships' questions in each of these cases in the affirmative, that is, in favour of the Plaintiffs below, the Respondents in error.

THE LORD CHANCELLOR (Lord *Cranworth*):—

My Lords, these are two appeals depending very much on the same principles as those which led to the decision of your Lordships' House last year, in the case of *The Mersey Docks and Harbour Board* v. *Cameron* (1). The question there was, whether the trustees of the docks and harbour, who are a body having no beneficial interest in the tolls and other produce of the docks, were rateable to the relief of the poor. The argument was, that merely constituting a public body, not receiving tolls for their own benefit, they were not liable; but your Lordships, after a long argument, decided that they were.

The question in the present two cases is different. Both cases arise out of one transaction. A ship called the *Sierra Nevada*, in entering, or endeavouring to enter, one of the docks, sustained injury by reason of a bank of mud left negligently at its entrance. The ship and the cargo were damaged. Two actions were brought against the Appellants, one by *Gibbs*, as owner of the cargo, the other by *Penhallow*, as owner of the ship. I do not think it necessary to go through the pleadings. In both cases the Exchequer Chamber held that the Appellants were liable. In both cases they have appealed, and the ground of appeal is, that they are not a company deriving benefit, like a railway company, from the traffic, but a public body of trustees constituted by the Legislature for the purpose of maintaining the docks, and for that purpose having authority to collect tolls, to be applied to the maintenance and repair of the docks, then in paying off a large debt, and ultimately in reducing the tolls for the benefit of the public.

In the case of *Gibbs*, it must be taken as admitted by the Appellants, that knowing that the dock was, by reason of an accumulation of mud therein, in an unfit state to be navigated, they did not take reasonable care to put the same "into a fit state for that purpose;" whereupon the *Sierra Nevada*, in endeavouring to enter into the dock, struck against the mud, and the cargo

(1) 11 H. L. C. 443; 11 Jur. N. S. 746

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thereby became damaged. In the other case (which did not arise upon a demurrer), it must be taken as an established fact, that the Appellants had, by their servants, the means of knowing the dangerous state of the dock, but were negligently ignorant of it. It is plain that if the Appellants are liable in the former case, they must be liable also in the latter. If the knowledge of the existence of the mud bank made them responsible for the consequences of not causing it to be removed, they must be equally responsible if it was only through their culpable negligence that its existence was not known to them. The principles, therefore, which are to regulate the judgment of the House in the one case, must also decide it in the other. And the question therefore is, what are the principles which regulate the liabilities of such a body as that of the *Mersey Docks and Harbour Board.*

Where such a body is constituted by statute, having the right to levy tolls for its own profits, in consideration of making and maintaining a dock or a canal, there is no doubt of the liability to make good to the persons using it any damage occasioned by neglect in not keeping the works in proper repair. This was decided by the Court of Queen's Bench, and the decision was affirmed in the Court of Error in the case of *Parnaby* v. *The Lancaster Canal Company* (1). The ground on which the Court of Error rested the decision in that case, is stated by Chief Justice *Tindal,* to have been that Defendants there, who constituted the company, made the canal for their profit, and opened it to the public upon the payment of tolls. And the common law in such a case imposes a duty upon the proprietors to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may do so without danger to their lives or property.

The only difference between that case and those now standing for decision by your Lordships, is, that here the Appellants, in whom the docks are vested, do not collect tolls for their own profit, but merely as trustees for the benefit of the public. I do not, however, think that this makes any difference in principle in respect to their liability. It would be a strange distinction to persons coming with their ships to different ports of this country,

(1) 11 A. & E. 223.

that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed.

It is impossible to argue, after the decision of this House in the case of the *Mersey Docks and Harbour Board* v. *Cameron* (1), that the Appellants are not in the occupation of the docks. They are as much the occupiers of them as if they received the tolls and dues for their own use and benefit. The principle of that decision, coupled with that of *Parnaby* v. *The Lancaster Canal Company*, must govern this case. The Appellants are the occupiers of the docks, entitled to levy tolls from those who use the docks, and so are liable to the same responsibilities as would attach on them if they were the absolute owners occupying and using them for their own profit.

It cannot be denied that there have been dicta, and perhaps decisions, not capable of being reconciled with the result at which I have arrived. But all these authorities have been so fully brought under review, in the very able and elaborate opinion of the learned Judges, delivered by Mr. Justice *Blackburn*, in answer to the questions put to them by your Lordships, that I do not feel myself called on to do more than to express my concurrence in that opinion.

I content myself, therefore, with moving your Lordships to give judgment in both cases for the Defendant in error.

LORD WENSLEYDALE:—

My Lords, the Court of Exchequer Chamber in both these cases founded its judgment on that of the Exchequer Chamber in the case of *Parnaby* v. *The Lancaster Canal Company* (2), in which case there was a company incorporated by Act of Parliament, for the purpose of maintaining a canal, to be opened for the use of the public on payment of rates which the canal company might receive for its own benefit (that is, the profits were to be divided amongst the shareholders), and the Court held that the common

(1) 11 H. L. C. 443; 11 Jur. N.S. 123. (2) 11 A. & E. 223.

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law imposed a duty on the proprietors not, perhaps, to repair the canal, or absolutely to free it from obstructions, but to take reasonable care so long as they kept it open for the use of all that might navigate it, that they might navigate it without damage to their lives or property.

Of the propriety of this decision there could be no doubt, where the profits were received for the benefit of the company. In the present case the dock trustees do not receive the rates for their own use, but to be applied to great public purposes for the benefit of all the subjects of the realm; that is, to maintain the docks for the use of any who choose to frequent them, and to pay the debt incurred in their construction, and the Court decided that there was no difference between that case and the present.

If this question had been *res integra*, not settled by the authority of decisions, I am strongly inclined to think that this decision of the Court could not be supported. It would appear to me that this case falls within the principle of those cases which have decided, that when a person is acting as a public officer on behalf of government, and has the management of some branch of the government business, he is not responsible for the neglect or misconduct of servants, though appointed by himself in the same business. This was the principle of the decision in *Lane* v. *Cotton* (1), and *Whitfield* v. *Le Despenser* (2), and other cases. The subordinates are the servants of the public, not of the person or persons who have the superintendence of that department, even if appointed by them.

Thus the Postmaster General, who has the management of one department of the public service, the duly receiving and conveying and delivering letters from and to different places, which is eminently beneficial to the whole community, and causes profit to the government, is not responsible for any of the servants of the post office department, though he might appoint or dismiss them; and whether the Postmaster General be one individual, as he is now, or two persons fill the one office, as in the case of *Whitfield* and Lord *Le Despencer*, or if more, however numerous, or the Crown were to make a corporate body for the regulation and government of the post office, neither individuals nor a corporate

(1) 1 Ld. Raym. 646. (2) Cowp. 754.

body would be responsible for the neglect of their servants. In this case, if there had been a Portmaster General for all the ports of *England* to take care that the receipt and discharge of goods and the repairs of ships should be easy and convenient, and the receipt of custom duties convenient; or suppose his duties to be limited to a certain number of ports, or suppose a corporation were appointed instead of an individual, would it cause that corporation to be responsible for the defects of its officers, by whom alone they act in the management of the docks, and in the due discharge of its duties towards the public, on whose behalf it was acting?

If we had now only to review a great number of cases connected with this subject, decided in different Courts, many contradictory and many very unsatisfactory, I should be disposed to abide by the decision of the case of *Metcalfe* v. *Hetherington* (1), where the trustees and managers of the harbour were held not to be responsible for the defaults of the persons actually employed in conducting the business of the harbour.

If this case depended only on the decision of the Courts below, I should feel great difficulty indeed in supporting the decision of the Court of Exchequer Chamber. But I cannot help thinking that the decisions of your Lordships' House, which are, no doubt, binding upon your Lordships and all inferior tribunals, have gone so far that they have concluded the question, and ought to be considered as deciding that the Appellants are responsible. In the case of the *Mersey Docks and Harbour Board Trustees* v. *Cameron*, and *Jones* v. *Mersey Docks and Harbour Board Trustees*, in June, 1865 (2), your Lordships, upon a full review and consideration, after a difference of opinion between the consulted Judges, decided that the Appellants, the *Mersey Dock Trustees*, were liable to be rated as occupiers, though they occupied those docks for the purposes of those who frequented the port, but derived no benefit for themselves from the occupation, and that they did not occupy for public purposes in such a sense as to exempt them from liability to poor rates.

It seems to follow, therefore, that they were not considered as being on the same footing as occupiers of public buildings for post

(1) 11 Ex. 257; 5 H. & N. 719.

(2) 11 H. L. C. 443,

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office or other government purposes, but were liable as mere private individuals; and, if so, it is difficult to say that they were acting on behalf of the public for the public benefit, and, therefore, were irresponsible for the neglect and defaults of their servants, by whom alone they could act. Whether they were acting for the benefit of the public or not seems to be decided by that case.

As we are bound by your Lordships' decision, the opinion of the learned Judges, delivered by Mr. Justice *Blackburn*, must be considered as correct, and, therefore, the judgment of the Court below ought to be affirmed.

LORD WESTBURY:—

4 Ch D 852

My Lords, I entirely concur in the conclusion derived from the authorities, and from the principles of law laid down in the very able opinion delivered to your Lordships by Mr. Justice *Blackburn*. I concur also in the observations of my noble and learned friend on the woolsack, and think that judgment ought to be given for the Defendants in error.

But I think it desirable to say a few words with reference to the difficulty felt by the learned Judges in consequence of certain observations that fell from Lord Chancellor *Cottenham*, and which are reported in the case of *Duncan* v. *Findlater* (1). I can well divine what was at that time passing in the mind of Lord *Cottenham*. He seems to have thought that if persons constituting a corporation are trustees of property for the direct benefit of certain individuals, and there is no other than corporate property,—and, if in their capacity as trustees an act is done, by order of the corporation, which amounts to a tort or trespass, and gives a right of action and a right to damages to any private individual, a Court of Equity would not permit an execution to issue, on any judgment that might be recovered, against the property of the corporation, seeing that it is property held upon trust for certain beneficiaries, and that the corporation, as trustees, have no interest therein. But, my Lords, I apprehend that that was a misapprehension on the part of the noble and learned Lord, and that it would lead to very mischievous consequences. It is by no means

(1) 6 Cl. & F. 894.

true that a Court of Equity is able to protect the property of beneficiaries against the act of trustees. If trustees alienate property for valuable consideration, to a person who pays that consideration, without notice of the trust, the interest of the beneficiaries suffer from that act; and it would be a very unreasonable and a very mischievous thing if, in the case of corporations dealing with the public or with individuals, such corporations should, by any conduct of theirs in respect to property committed to their care, give a right of action to individuals, that such individuals should be deprived of the ordinary right of resorting for a remedy against the body doing or authorizing these acts, and should be driven to seek a remedy against the individual corporators, whose decision or order, in the name of the corporation, may have led to the mischief complained of. It is much more reasonable in such a case that the trust or corporate property should be amenable to the individual injured, because there is then no failure of justice, seeing that the beneficiary will always have his right of complaint, and his title to relief against the individual corporators who have wrongfully used the name of the corporation.

My Lords, the learned Judges observed, and with very great correctness, that it is not everything that falls from a noble and learned Lord in advising the House which is to be considered as the opinion of the House. Those observations of Lord *Cottenham* which directly tend to this conclusion—that the corporation in the case supposed would not be amenable, nor would the corporate property be liable, but that the party injured would be obliged to have resort to the individual members who directed the act to be done—would, if they were recognised as the law, undoubtedly lead to very great evil and injury.

My Lords, I confine my observations to the case of a remedy sought for a wrongful act, because your Lordships are very well aware that the rule has been well established that, if in the case of a contract entered into with a corporation created by Act of Parliament, the contract is made by the corporation *ultra vires* of the corporation, the party may not be entitled to recover under that contract. That may be a very convenient rule, and it is not at all affected by the considerations we are now dealing with. But with regard to the observations attributed to the noble and

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learned Chancellor, Lord *Cottenham*, I conceive that they ought not to be taken or regarded as establishing any rule that at all interferes with the decision at which your Lordships have arrived in the case now before you.

With regard to what has been suggested by my noble and learned friend (Lord *Wensleydale*), that it would be a more correct principle to hold officers of public departments not to be answerable for inferior servants; that may be quite correct where an officer, fulfilling a public duty, is directly appointed by the Crown, and is acting as the servant of the Crown; but it has no application to the case of trustees incorporated for the purpose of public works, and standing in relation to the public in the way these trustees do in the present case. I concur, therefore, in the motion of my noble and learned friend.

Judgment for the Defendants in Error.

Attorneys for the Plaintiffs in Error in both cases: *Norris & Allen.*

Attorneys for the Defendants in Error, *Gibbs* and Others: *Uptons, Johnson & Upton.*

Attorneys for the Defendants in Error, *Penhallow* and Others: *Gregory, Rowcliffe & Rowcliffe.*

SIR J. W. RAMSDEN, BART. . . . . APPELLANT;

AND

LEE DYSON AND JOSEPH THORNTON . . RESPONDENTS.

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Parol agreement—Tenancy—Right to lease—Equity—Agents.

If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of equity will not afterwards allow the real owner to assert his title to the land.

But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it.

So, if a tenant builds on his landlord's land he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined.

If the tenant, being a mere tenant at will, builds on the land in the belief that he thereby acquires a title afterwards to claim a lease of the land, and the landlord allows him so to build, knowing that he is acting in that belief, and does not interfere to correct the error, *Semble*, that equity will interfere to compel the grant of a lease.

Quære, whether an agent, having authority to let lands, can bind his principal by a stipulation that in certain events the tenant shall be entitled to have a lease upon certain terms.

If a principal knows that a stranger is dealing with his agent under the belief that all statements made by the agent were warranted by the principal, and, so knowing, allows the stranger to expend money in that belief, *Semble*, that a Court of equity would not afterwards allow the principal to set up want of authority in the agent. But this knowledge must be brought home to the principal.

T. took a piece of land belonging to *R.*, from *R.'s* agent, by parol agreement; it was known to all parties that the land was to be built upon. A ground rent was fixed at £4. *T.* laid out £1800 in building. *T.* afterwards made a written application to *R.'s* agent for another piece of land, also for the purpose of building on it. In this application *T.* declared himself willing to take the land as "tenant at will." The land was allotted to him, and the rent fixed at £1 0*s.* 7*d.* When buildings were erected on the land the persons who had so taken the land were entered in *R.'s* rental books as tenants. It was admitted on all sides that where such takings were made the tenants would never be disturbed while the ground rent fixed as above described was paid. When the tenant desired to transfer the land to another person, notice was given to the agent, and the entry of the name of the tenant in the books of rental kept by the agent was altered. In many cases the form of proceeding was, that the land was surrendered to the landlord, and the new tenant was

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accepted, much after the form of a transfer of copyhold. The tenancies were very numerous. *T.* alleged that there was believed to exist, and that *R.'s* agents had, by their words and conduct, encouraged such belief, a "tenant right tenure" on the estate, that a person who had so taken and built upon *R.'s* land was entitled at his pleasure to become a leaseholder, and to demand the grant of a lease for sixty years, renewable every twenty years on payment of a fine equal to double the annual ground rent. Such leases had, in fact, been granted, but there was no direct evidence of their being granted on any such claim of right; there was, however, evidence that a railway company, being desirous of obtaining some of these pieces of land held under parol agreement on the payment of a ground rent, had refused to purchase them unless such leases were granted, and that in fact such leases were granted, and then the tenants received compensation for their buildings:—

Held (*diss.* Lord *Kingsdown*), reversing the decision of the Court below, that these circumstances did not shew the existence of anything greater than a tenancy from year to year, and did not establish any title to compel the grant of a lease, and, consequently, that the landlord having brought ejectment against *T.*, equity could neither interfere to compel the grant of a sixty years' lease, nor to stay the ejectment.

Per Lord *Kingsdown.*—If a man, under a verbal agreement with a landlord for a certain interest in land, or under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and, upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation.

Under the special circumstances of the case the bill was ordered to be dismissed without costs.

THE Appellant in this case was the grandson of the late Sir *J. Ramsden,* Bart., and held certain estates at *Huddersfield* and its neighbourhood. Among the property of the late Sir *J. Ramsden* were several pieces of land forming part of the commons or waste of the manor of *Huddersfield,* allotted to him in the year 1789, and held by him in fee simple to the time of his death in July, 1839. The Appellant became possessed of these pieces of land under the will of his grandfather. The Respondent, *Joseph Thornton* (of whom the other Respondent, *Dyson,* was mortgagee), became a tenant to Sir *J. Ramsden* of a piece of land forming part of this waste, and, after Sir *J. Ramsden's* death, of another piece of the same land, which was allotted to him by the guardians of the Appellant, who was then a minor. The tenancies appeared to have been created in this way: No agreements in writing were entered into by Sir *J. Ramsden,* but application was made to his

steward or land agent for the grant of a piece of land. The steward stated the amount of rent required for it, and allotted a piece of land. The applicant took possession of it, and built upon it. When a person had thus commenced a tenancy his name was entered on the rental roll of the estate. If he wished to transfer his tenancy to another person he went to the agent and announced his wish; the agent prepared a paper called "a transfer," which was signed by the tenant and the proposed transferree, and handed to the agent, who retained it till the next audit, when he entered the name of the transferree in the rental, in the place of that of the former tenant. In the present instance, when *Thornton* first took a piece of land (the date of the taking was in controversy) he did not sign any document. He built upon the land, occupied the house, and his name was entered on the rent roll as tenant. The rent he paid was 4*l.* a year. In June, 1845, *Thornton* wrote the following note to the guardians of the present Appellant:—"Gentlemen,—I beg to make application to you for a plot of ground situated at *Paddock, Huddersfield,* on which I am desirous of building a mistal and other buildings, and which I am willing to hold under you as tenant at will at such rent as you may think proper to fix." This letter was answered on the 25th of July, 1845, by the then agent, *Alexander Hathorn,* in a note which said: "The plan of the ground on which you propose to erect a mistal has been approved and signed," fixed the annual ground rent at 1*l.* 0*s.* 7*d.*, and went on thus:—"The first half-year's rent will be payable at November rent day, 1846. As soon as your building has been completed I will thank you to come here for the purpose of having your name regularly entered in the rental of this estate." In September, 1857, *Thornton,* who had obtained a loan from the *Commercial Inn Money Club,* executed, jointly with *Lee Dyson,* the following document: "I, *Joseph Thornton,* of *Paddock,* near *Huddersfield,* &c., do hereby give up possession of a dwelling-house and outbuildings situated at *Paddock* aforesaid unto Sir *J. W. Ramsden,* Bart.; and I, the undersigned *Lee Dyson,* of, &c., for and on behalf of the *Commercial Inn Money Club,* do agree to become tenant at will for the said premises under the said Sir *J. W. Ramsden,* Bart., to hold from the 13th of May last at such rent as he, the said Sir *J. W. Ramsden,* Bart., shall

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from time to time think proper to fix." A similar paper was executed, having reference to the barn and mistal which formed the subject of the second occupation, by *Thornton*, and both the transfers were duly entered in the Appellant's transfer book. Evidence was given that a general belief existed among the tenants that such a taking entitled any tenant at his pleasure to call for the grant of a lease. On one occasion a railway company, being desirous to purchase some of the houses erected by persons who merely held them on the parol agreement and the payment of a ground rent, refused to treat for the same except leases were granted, and leases for sixty years, renewable every twenty years on payment of a fine, were in fact granted, and then the respective tenants sold their buildings to the railway company, and received the compensation money. The question between the parties was, on what terms *Thornton* held these two pieces of land, whether merely as tenant at will, or with a right to call for a lease of the kind described? In November, 1861, the Appellant, in order to try this question, sent to *Thornton* a notice to deliver up the two pieces of land, together with "the dwelling-house, cottage, pleasure-grounds, gardens, barn, mistal, and stable," then held by him, and afterwards proceeded by ejectment to enforce such notice.

In February, 1862, *Thornton* and *Dyson* filed their bill (afterwards amended) against the Appellant, which alleged that the land held by them had been taken on a "tenant-right" tenure prevailing at *Huddersfield*, under the late Sir *J. Ramsden*, under which large sums of money were laid out upon the land, the tenants of which were entitled at any time to demand the grant of a lease for sixty years, renewable every twenty years upon payment of a fine, according to the terms therein set forth (1). The bill prayed that it might be declared that *Thornton* was entitled to have a lease granted upon the said terms, or that he and *Dyson* were entitled to a lien on the property; that they could not be turned out of possession without being repaid the moneys expended by *Thornton* on laying out the property and building on it, or such other compensation as the Court might think fit; that

(1) These terms are not here stated, because they are referred to very fully in the judgments of their Lordships. As their judgments depended upon their appreciation of the facts and evidence in the case, the detailed statements of those facts will be best sought for in the judgments themselves.

directions might be given to ascertain the amount of this compensation, and that in the meantime the proceedings in the ejectment might be stayed; and for farther relief.

Answers were put in and evidence taken on both sides, and in March, 1864, the cause having been heard before Vice-Chancellor *Stuart*, as on a motion for a decree, His Honour was pleased to make an order by which it was declared that *Thornton* was entitled to have a lease or leases of the two pieces of land on the terms stated in the bill (1). This was an appeal against that decree.

The *Attorney-General* (Sir *R. Palmer*), and Mr. *Bacon*, Q.C. (Mr. *Chapman Barber* was with them), for the Appellant:—

The evidence failed to establish any contract, express or implied, by which the Appellant was bound to grant a lease, as directed by the decree. The system or custom called in the bill "tenant right tenure," was not proved, but was disproved by the evidence. So far as the evidence went, it shewed that the tenants took leases, or went without them, as best suited their convenience, and they often went without them because they obtained the land at a lower rent than would have been paid upon a lease, avoided the expense of a lease, and were not required to enter into the covenants usually contained in building leases. Then, again, the writing under which the Respondents' land was taken in 1845 shewed the terms of dealing between the parties, and that writing neither conferred on *Thornton* the right to claim a lease, nor to claim compensation for buildings erected by him should he be turned out of possession; on the contrary, it expressly described *Thornton* as a "tenant at will."

The documents of September, 1857, in like manner shewed a surrender to the Appellant by *Thornton* and the acceptance by *Dyson* of the surrendered property as "tenant at will," to the Appellant.

No relief can be granted here as upon specific performance, nor have the Respondents any claim to relief upon general equity, merely because expenditure has been made by the tenant under the observation of the landlord, but not under a specific agreement or arrangement: *Pilling* v. *Armitage* (2).

(1) *Thornton and Dyson* v. *Ramsden*, 4 Giff. 519. (2) 12 Ves. 78.

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Mr. *Malins*, Q.C., and Mr. *Daniel*, Q.C. (Mr. *Fielding Nalder* was with them), for the Respondents:—

The Respondents are, upon the principles of general equity, fully entitled to the relief they seek. The system of allowing persons to take pieces of land and build upon them, such persons only paying a small ground rent, but being entitled to leases on settled terms, as stated in the bill, had been acted on for many years, and was recognised as an existing system, not only by the repeated assurances of the agents, but even by the private Acts of Parliament which had been obtained with regard to the *Ramsden* estates. The tenants, therefore, had the strongest possible assurances that they might lay out their money in perfect security. Equity would not allow their well warranted belief on this matter to be disappointed. In *Gregory* v. *Mighell* (1) there had been an agreement for a lease, possession was taken, and expenditure permitted; specific performance was there decreed. Expenditure of money, making the property so much more valuable than before, was held in the *Earl of Oxford's Case* (2) sufficient to entitle the persons expending the money to the protection of the Court of Chancery. [LORD CRANWORTH:—That case was before the *Statute of Frauds*.] *Mundy* v. *Jolliffe* (3), and *Pain* v. *Coombs* (4), shew that the acts of the parties may, by acquiescence and part performance, render that statute inapplicable: *Lillie* v. *Legh* (5); *Shillibeer* v. *Jarvis* (6); *Powell* v. *Lovegrove* (7); *Farrall* v. *Davenport* (8); and the observations made by Lord *Thurlow* in *Allan* v. *Bower* (9), are to the same effect. Lord *Hardwicke*, in the *East India Company* v. *Vincent* (10), held that where a landowner suffers another man to build on his ground, without setting up a right till afterwards, the Court will oblige the owner to permit the person so building to enjoy quietly and without disturbance. *Pilling* v. *Armitage* (11), is not in point; the alleged agreement was there positively denied, and there was no acquiescence. Here the Respondents shew a contract, possession

(1) 18 Ves. 328.
(2) 1 Ch. Rep. 1; 1 Wh. & Tu. Leading Cases, 442.
(3) 5 My. & Cr. 167.
(4) 3 Sm. & Giff. 449; 1 De G. & J. 34.
(5) 3 De G. & J. 204.
(6) 8 De G. M'N. & G. 79.
(7) Id. 357, 2 Jur. N. S. 791
(8) 3 Giff. 363, 5 Jur. N. S. 862
(9) 3 Bro. C. C. 153, 169.
(10) 2 Atk. 83.
(11) 12 Ves. 78.

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taken under it, rent paid, and money expended, and there can be no doubt that all this took place under a general belief which was never contradicted. In *Stiles* v. *Cowper* (1), acquiescence was held sufficient to give the right; and though in *Dann* v. *Spurrier* (2), Lord *Eldon* refused the relief, because he thought the facts requiring it not established, he fully assented to the doctrine of equity as established in the previous cases. In the *Unity Bank* v. *King* (3), a father put his two sons into possession of a piece of ground on which he had erected buildings of the value of £280. They afterwards, of their own accord, erected other buildings at an expense of £1200, and it was held that they had a lien on the premises for their outlay. *Surcome* v. *Pinniger* (4), *Dowell* v. *Dew* (5), *Shannon* v. *Bradstreet* (6), all tend to shew that in such a case as this equity will interfere, even against a remainder-man.

The facts in this case are clearly in favour of the Respondents. Take the letting here to be entirely by parol, still, even at law, a parol licence to put a sky-light over the Defendant's area (which impeded the light and air from coming to the Plaintiff's dwelling-house) was held incapable of being recalled at pleasure after the work had been executed at the Defendant's expense, at least not without tendering the expenses: *Winter* v. *Brockwell* (7).

The words "tenant at will" in the application for the second piece of land were used in the same sense, and were so understood by all parties, as in a case of copyhold, that is, "at the will of the lord according to the custom of the manor," and all the tenants believed, and were encouraged to believe, in the existence of the custom.

The *Attorney-General* replied.

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THE LORD CHANCELLOR (Lord *Cranworth*):—

My Lords, this was an appeal from a decree of Vice-Chancellor *Stuart*, bearing date the 2nd of March, 1864, whereby it was declared that the Plaintiff, *Joseph Thornton*, was entitled to have a

(1) 3 Atk. 692.
(2) 7 Ves. 231.
(3) 25 Beav. 72, 4 Jur. N.S. 470
(4) 3 De G. M'N. & G. 571, 17 Jur. 196
(5) 1 Y. & C. Ch. 345.
(6) 1 Sch. & Lef. 52.
(7) 8 East, 308.

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lease or leases granted to him of two properties at *Paddock*, in the pleadings in the cause mentioned, at a ground rent or ground rents double the amount of the rent then payable for the same respectively, renewable at the times and on the terms therein mentioned; and it was ordered that the Appellant, Sir *John William Ramsden*, should grant to the said Plaintiff such lease or leases accordingly. The bill, which was filed by *Joseph Thornton*, and by the Respondent *Dyson* claiming as an incumbrancer under him, stated the circumstances in which *Thornton* had become possessed of the land in question, and which they contended entitled them, on general principles of equity, to claim from the Appellant a lease or leases, the particular terms of which I will not at present refer to. The Plaintiffs did not allege that there was any contract, written or verbal, for granting any such lease, nor was relief asked or given on the ground of specific performance of a contract. But His Honour thought that though there was no contract, and so that no case was made for specific performance, yet on general principles of equity the Plaintiffs were entitled to the relief which they asked, and he made a decree accordingly.

The property in question consists of a house and out-buildings, forming part of the town of *Huddersfield*, or its suburbs. The late Sir *John Ramsden*, the grandfather of the Appellant, was, in and prior to the year 1780, seized in fee simple of a large tract of land which has since that time been built upon, and which now forms a large part of the town of *Huddersfield*.

John Charles Ramsden, the eldest son of Sir *John*, died in his father's lifetime, leaving the Appellant, Sir *John William Ramsden*, his only son and heir-at-law; and Sir *John* himself died in 1839, leaving the said Appellant, his grandson, then only eight years of age.

Sir *John*, by his will dated in 1838, and made after the death of his son, devised all his estates, except certain estates which had been settled on the marriage of his said son (the excepted estates do not include any part of the property in question in this cause), to the use (subject to several charges and trust terms) of his grandson, the Appellant, for life, with remainder to his first and other sons in tail male. There were leasing powers in the will, to which I need not at present advert. Sir *John* resided at *Byrom*, about

thirty miles from *Huddersfield*, which latter place he rarely visited. He confided the management of that property to his steward or agent, Mr. *John Bower*, who resided at or near *Byrom*, but who was accustomed to visit *Huddersfield* twice a year at audits, for the purpose of receiving the rents and looking over the property.

The mode in which this *Huddersfield* property was managed was peculiar. A book or roll was kept of the tenants; and, as the town became extended, any person desiring to take land for the purpose of building a house, used to apply to the agents of Sir *John* for the land he wanted. This was then marked out for him; he erected his buildings; the ground rent was fixed, and his name was afterwards entered on the roll as a tenant, and he paid his rent at the usual day or days of audit. If he wished to sell his house, he and the purchaser used to attend on the agent, and surrender, or purport to surrender, his property into the hands of Sir *John*, and the name of the purchaser was substituted for that of the original tenant. The same course was followed on a mortgage, only that in that case both names, that of the mortgagor and the mortgagee, were entered as tenants on the tenant roll. In the event of death, the name of the legatee or next of kin was substituted for that of the deceased. Persons thus holding land were popularly described as holding by tenant right.

But besides these tenants by tenant right, there were other tenants who obtained regular leases; and the universal, or nearly universal, form of lease was a lease for sixty years, renewable for ever at the end of every twenty or forty years on payment of a stipulated fine. These tenants holding by lease were entered on the same tenant roll as the tenants by tenant right; but a memorandum was made against their names, signifying that they held by lease, and the rent at which they held was always at a considerably higher rate than that at which the other tenants held.

The Plaintiff *Thornton* took the two pieces of land, the subject of this suit, on the tenant right tenure, the one in the year 1837, in the lifetime of Sir *John*, the other in the year 1845, after his death. The circumstances connected with his taking the land in 1837 are thus stated by him in the bill:—He says that in the year 1837, being desirous of erecting a dwelling-house on a piece of high ground at *Paddock*, part of the *Huddersfield* property, devised

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by the will of Sir *John*, he applied to Mr. *Joseph Brook* (whom he describes as one of the duly authorized agents of Sir *John*, with respect to the management and letting of the *Ramsden* estates and as transacting all the business relating thereto in the absence of Mr *Bower*), and stated to him his desire to become tenant of the piece of ground in question, as he wished to erect a dwelling-house thereon for himself. *Brook*, he says, informed *Bower* of what had thus passed, and *Bower* having afterwards come over to *Huddersfield* to an audit, went with *Thornton* to *Paddock*, accompanied by *Thomas Brook* (a son of *Joseph Brook*), who was then about nineteen years of age, and who acted for his father. The bill then states that *Thornton* pointed out to *Bower* the land he wished to have for his house, and that *Bower* assented to the application, saying that he would leave to *Joseph Brook* the staking out of the exact quantity of land to be taken. The precise quantity of land was afterwards agreed on between *Thornton* and *Joseph Brook*, and the ground rent was fixed by *Brook* at an annual sum of £4. *Thornton* then built his house, and has ever since paid the reserved rent of £4 per annum.

The bill then alleges, that while the building of the house was in progress, and when it was nearly completed, *Joseph Brook*, accompanied by *Thornton* and his father, came on to the land, and on that occasion *Thornton* consulted *Joseph Brook* as to the prudence of his taking a lease of the land and buildings; when *Joseph Brook* stated it would be folly in him to take a lease, that he was equally safe without one, and that he could get a lease whenever he wanted it; the lease referred to being, as *Thornton* alleges, a lease for sixty years, renewable every twenty years on payment of two years' ground rent as a fine; no other lease then existing or being then known on the *Ramsden* estates, at *Huddersfield*. No paper or document was signed by *Thornton*, and he alleges that he took the land relying on what had been said by *Joseph Brook*, and on the belief, universally entertained at *Huddersfield*, and encouraged by Sir *John* and his agents, that he could have a lease of it for sixty years, renewable every twenty years, whenever he might think fit, and that he would never be disturbed so long as he paid his £4 ground rent, and in the knowledge that very many other persons who had taken plots of lands and built on them, on the

same belief and assurance, had, on application, had leases granted to them for sixty years, renewable every twenty years.

The book or roll of the tenants of the *Huddersfield* property was kept at *Longley Hall*, an old mansion-house situate on part of the property, and the bill alleges that after *Thornton* had taken the piece of land in question he was entered in that book as the tenant thereof, at a yearly ground rent of £4.

Mr. *Bower* died in the month of May, 1844, and on his death the trustees of the will of Sir *John* appointed Mr. *George Loch*, now one of Her Majesty's counsel, to succeed him as auditor and manager of the estates, and as he resided at a distance, he appointed Mr. *Alexander Hathorn* to be the resident agent, subject to his control and superintendence. *Alexander Hathorn* resided at *Longley Hall.*

In this state of things the bill alleges that *Thornton*, finding himself, in the year, 1845, inconvenienced for want of out-door offices, applied to *Hathorn* for a second piece of ground, and that the same was accordingly measured out for him by two persons acting under the said *Thomas Brook*, who had survived his father *Joseph Brook*, and was then one of the authorized surveyors of the *Ramsden* estates, that he, *Thornton*, then erected thereon, under the superintendence of *Hathorn*, the additional buildings which he wanted, and that, after he had done so, he received from *Hathorn* a letter, partly printed and partly written, fixing the ground rent for this additional land at £1 0s. 6*d.* per annum, which additional rent has been ever since regularly paid. The bill alleges that the money expended in building on the two pieces of land amounted at least to £1850.

On occasion of the first hiring, in 1837, no paper was signed by *Thornton*, but on applying at *Longley Hall* for the second piece of land a paper, containing a form of application, was put before him for his signature, as follows:—"*Huddersfield*, 16th June, 1845. Gentlemen,—I beg to make application to you for a plot of ground situate at *Paddock*, *Huddersfield*, on which I am desirous of building a mistal and other outbuildings, and which I am willing to hold under you as tenant at will, at such rent as you may think proper to fix.—I am, gentlemen, your most obedient servant.—To the trustees and guardians of Sir *John William Ramsden*, Baronet."

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This he signed, but, as he says, without considering its purport or effect, without being furnished with a copy, and without having had it explained to him; he signed it in the belief that it was a mere matter of course, and in the firm persuasion that he was to hold this second piece of land on precisely the same terms as to not being disturbed in the possession, and as to a sixty years' lease, as those on which he held the other land.

These are the circumstances in which *Thornton* alleges that he became a tenant, first of Sir *John Ramsden*, and afterwards of his devisees. And there can be no doubt that he thereby became at law a mere tenant from year to year. As to the first piece of land, on which he erected the principal buildings, he took it from *Bower*, as agent of Sir *John Ramsden*, at an agreed annual rent of £4, but without any stipulation as to the term during which he was to hold it; as to the second, he took it on a written application that it might be demised to him as tenant at will. He paid for several years the rent of both those pieces of land, and so had at least a tenancy from year to year.

Notices to determine these tenancies were given by the Appellant, Sir *John W. Ramsden*, and ejectments were brought to recover possession. There being no legal defence to those actions, the present bill was filed by *Thornton* and by *Dyson*, who claimed as mortgagee under him, on the ground that *Thornton*, though at law a mere tenant at will, had an equitable right to a lease for sixty years, with a covenant for perpetual renewal on payment of certain periodical fines. Whether he has established this right is the question raised in the cause. The Vice-Chancellor was of opinion that he has, and so decreed accordingly.

It will be convenient to consider the case first as to the land taken in 1837, in the lifetime of Sir *John*. The decree proceeds on the ground that it would have been a fraud in Sir *John* to refuse to grant the lease demanded; and so that his grandson, the Appellant, deriving title only as a volunteer through his will, is bound to do what it would have been a fraud in his grandfather to refuse to do. It may be well to consider shortly what the principles of equity on this subject are.

15 L.R. Ir. 101

If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right,

and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights.

It follows as a corollary from these rules, or, perhaps, it would be more accurate to say it forms part of them, that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end. The Appellant contends that it is within this principle that *Thornton* is brought. He acquired, it is said, possession of the land in question as a mere tenant at will, or from year to year, to Sir *John*, and if on that infirm title he thought fit to expend a large sum in building, there is no principle of equity which prevents Sir *John*, or his devisees, from asserting their legal rights by determining the tenancy, and so obtaining the benefit of his expenditure.

The present bill was filed, not controverting this general principle, but contending that there were special circumstances raising an equity in favour of the tenant, arising out of a long uniform course of dealing adopted on the *Huddersfield* estate, whereby persons taking land, though only as legal tenants at will, or from

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year to year, were led by Sir *John* to suppose, and did suppose, that they acquired a right, when they had built on the land, to hold it for an indefinite time without disturbance, and to become, at any time they might think fit, lessees for sixty years, with a right to perpetual renewal at the expiration of every twenty or forty years on certain well understood terms.

His Honour the Vice-Chancellor thought that such a state of facts was established, that *Thornton*, when he laid out his money in building his house, did so in the belief, created or encouraged by Sir *John*, that he was at any time entitled to call for such a lease as he claimed, and that Sir *John* knew that he believed this to be his right, but nevertheless allowed him to proceed. His Honour, I presume, considered this to be in principle the same thing as when the owner of land sees another building on it in the mistaken belief that it is his own. If in that case equity would not allow the owner to lie by and profit by expenditure made by another in the erroneous supposition that the land on which it was made was his own, so neither would it be just to allow a landlord knowing that his tenant was building on the notion, however mistaken, that he had rights beyond those of a mere tenant from year to year, to profit by expenditure made in consequence of that mistake. There is great force in this reasoning; and if I had come to the conclusion that *Thornton*, when he erected his building in 1837, did so in the belief that he had against Sir *John* an absolute right to the lease he claims, and that Sir *John* knew that he was proceeding on that mistaken notion, and did not interfere to set him right, I should have been much disposed to say that he was entitled to the relief he sought. But a full consideration of the evidence has not led me to any such conclusion. It has failed to satisfy me, first, that *Thornton* supposed that he had against Sir *John* any absolute right beyond that of a tenant from year to year; or, secondly, that Sir *John* knew or believed that *Thornton* was expending his money in the mistaken belief that he possessed such a right.

The case made by the bill is, that Sir *John Ramsden*, by his agents, and since his death, his trustees, in order to induce persons to build on what is called the tenant right tenure, informed applicants for building plots that they would be equally safe, and that the rents would be less in amount without a lease than with it;

and, farther, that they could have a lease whenever they required it; and that, by means of this course of dealing, entire confidence was created in the tenant right system, as conferring a good title to hold the lands so taken for ever, provided only they paid their rent; and, lastly, that they acquired a right to call for a sixty years' renewable lease, whenever it might be desired.

The Appellant, Sir *J. W. Ramsden*, by his answer, admits the existence of a large class of tenants holding by what is called the tenant right tenure; but he denies that it was an incident of that tenure that persons holding under it were more than tenants from year to year, or were entitled to call for a lease. On the contrary, he says that such tenants never had any title, except as tenants at will, or tenants from year to year, and that in consequence of their holding by this precarious tenure they had their land at a rent very much less than another class of tenants who took land on sixty years' leases, renewable for ever at the end of twenty or forty years, on certain terms stipulated in each particular case.

The parties in the cause being thus at issue, the question is,—What is the fair result of the evidence? Does it establish that which the Plaintiffs were bound to establish? Does it shew that when *Thornton* erected his buildings in 1837 (with which case alone we are now dealing), he did so in the belief that, though he was only at law a tenant at will, yet he had a right to hold his land to him and his personal representatives for ever, so long as he duly paid his rent; and, farther, that he had a right to call for a sixty years' lease, renewable for ever, whenever he should be minded so to do? and does it also shew that Sir *John* knew that he was laying out his money in that belief?

In support of their case the Plaintiffs offered, in the first place, the evidence of about 250 persons holding land in *Huddersfield* by the tenant right tenure, and they say that the bill correctly represents the tenant right tenure as established at *Huddersfield* by Sir *John* and his representatives, on the faith of which they acquired and hold their properties, and that they never heard it questioned before the proceedings now set on foot by the Appellant which have given rise to the present suit.

None of these witnesses states when it was that he became tenant under what he calls the tenant right tenure. It would

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have been material that they should have done so; for, as the only question on which this evidence bears on this part of the case is that relating to what was the belief of *Thornton* when he built his house in 1837, it would have been important for him to shew that the general belief to which the witnesses refer existed at that time. It is consistent with the evidence of these witnesses, that they all acquired their interests after the death of Sir *John*, and that no such general reputation or belief as that to which they refer existed in his lifetime. I am the more led to advert to this distinction because I observe that they speak of the tenant right tenure as having been established by Sir *John* and his representatives; and the question relating to what was done in the time of his representatives, will, I think, be found to be open to some observations not applicable to what was done in his lifetime.

It must farther be observed, that these numerous deponents were all, or almost all, in stations of life, so far as we can collect from their descriptions, making it improbable that they would be able well to scan and consider the precise nature of the reputation to which they depose. About thirty of them appear to have been unable to sign their names, and it is no harsh estimate of the weight due to their testimony to say that they were very likely to have been led by an involuntary bias to give a colour to the general belief and reputation in question, to which a little closer examination, by persons in a different sphere of life, might have shewn it was not entitled. With these few remarks I shall leave this part of the evidence, to which, it is but fair to say, no great weight was attributed at the bar.

What was mainly relied upon was the evidence offered in support of the allegation that Sir *John* and his agents by their words, acts, and deeds, and by every means in their power, encouraged persons to erect buildings on the tenant right tenure, and stated that there was no occasion for leases, that such persons would be as safe without as with leases, and that they might have leases whenever they might require them, and that they should never be disturbed in their possession.

In support of these allegations evidence was given of statements made by *Joseph Brook*, whom I will assume to have been the principal local agent of Sir *John*, living at *Huddersfield*, and

acting there for him under Mr. *Bower*. *William Brook*, the surviving brother, and *John Brook*, a son of *Joseph Brook*, were both examined as witnesses, and they both say that *Joseph Brook* was in the constant habit of assuring all persons who, on applying for land, consulted him as to the expediency of taking a lease, that they would be as safe without a lease as with one; that so long as they paid their rent they would never be disturbed, and that they might have a lease whenever they thought fit to apply for it.

The language, then, attributed to *Joseph Brook* relates to two propositions; first, that persons taking land without a lease would never be disturbed so long as they paid their rent; secondly, that persons taking land without a lease might have a lease whenever they chose to call for it. As to so much of this evidence as relates to the first proposition, I give full credit to the accuracy of the witnesses, but I cannot say the same as to the second. I think, for reasons to which I will presently advert, their recollection on that point cannot safely be trusted.

Assuming, however, that he did make the statements attributed to him by these witnesses, it becomes important to consider what is the fair import of the language used by him, supposing it to be correctly given by the witnesses who speak to having heard it. And first, as to the statement that there would be no advantage in a lease; for that so long as the rent was paid the parties taking the land would never be disturbed. The Respondents say it amounted to a statement that persons taking land at a yearly rent, and building on it, would have a right to hold that land to them and their personal representatives for ever, provided the rent was paid. The Appellants say, it must be interpreted as meaning only that though the right conferred was that of a mere tenant at will, or tenant from year to year, yet so long as the ground rent was duly paid there was no intention to disturb the tenants in their possession, and that they might thus safely allow the matter to rest in the honour of the *Ramsden* family.

If this latter be the true construction, it is clear that even if such statements as are attributed to *Joseph Brook* had been made by Sir *John* himself, the persons taking the land would have acquired no right, legal or equitable, beyond that of a mere tenant from year to year. If any one makes an assurance to another,

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with or without consideration, that he will do or will abstain from doing a particular act, but he refuses to bind himself, and says that for the performance of what he has promised the person to whom the promise has been made must rely on the honour of the person who has made it, this excludes the jurisdiction of Courts of equity no less than of Courts of law. The important question, therefore, is, which of these two constructions is the correct one? I have no hesitation in saying that, in my opinion, that of the Appellant is the true construction.

In the first place, even taking the language to be exactly that attributed to *Joseph Brook* by his brother and his son, it is hardly that which he would have used if he had meant to represent to those who consulted him, that after they had taken land at a rent, and so become tenants, there would be no power in their landlord to disturb them so long as they paid their rent. What he is represented to have said to them is, that so long as they paid their ground rents, neither they nor their children after them would be molested; not that they *could* not, but that they *would* not be molested. The same observation may be made as to the evidence of the witnesses who speak to their conversations with *Joseph Brook* when they took their land for building. What they represent him to have said, when they asked him as to the expediency of taking a lease, is, that so long as they paid their ground rent they would never be disturbed; not that they could never be disturbed; and to one of them, *Joe Moore*, he added, "nor will your present rent ever be raised."

This distinction appears to me to be not unimportant, when the question is, whether it was intended to represent to the persons taking the land that they had a right to retain it for ever, or only that there was no intention on the part of the landlord to disturb them, and that they might rely on the honour of the family that no such step as evicting them from their holdings ever would be taken so long as they paid their rent. The language is at least as consistent with the latter view of the case as with the former, and must, I think, be interpreted in connection with the evidence of *Thornton's* solicitor, *Frederick Robert Jones*, who says, that for many years prior to 1858 the investment of money on the tenant right tenure was made without hesitation because of the confidence

which the people reposed in the honour of the *Ramsden* family; and many other witnesses speak to the same effect.

Thus interpreted, the language attributed to *Joseph Brook* would not, either at law or in equity, enlarge the interest which every tenant took as tenant at will beyond his becoming afterwards tenant from year to year.

But the more important question yet remains to be considered, namely, whether there is evidence to shew that Sir *John Ramsden* knew, or even suspected, that representations were made which might fairly be supposed to lead his tenants at will or from year to year to expend money in building, in the belief that by building they acquired a title which he could never disturb. On this point the evidence of the Respondents wholly fails.

There are only two occasions on which Sir *John* is alleged to have been present when anything passed countenancing the notion that the tenants by what is called tenant right had any rights beyond that of tenants from year to year. The first is that spoken to by *William Brook*, the surviving brother of *Joseph*. He tells us that in the year 1800, when Sir *John* and Mr. *Bower* were at *Huddersfield*, they, together with his brother *Joseph* and himself, were met in the road by a man named *Mortimer*, who had then recently erected a row of valuable buildings on his own freehold land. *Mortimer*, the witness says, pointed out to Sir *John* some old tenant right buildings which were an eye-sore to the row of houses he had so erected, and asked Sir *John* to have them removed. Sir *John* listened to him, and then, after taking Mr. *Bower*, *Joseph Brook*, and the witness aside, and after making inquiries of them as to the name of the owner, and how long the old buildings had been erected, and after making other inquiries, turned round to *Mortimer* and said, "These are tenant right buildings; those who hold them shall never be disturbed so long as they pay their rent," or to that effect.

This is part of the evidence of the Respondents, and must have been offered by them for the purpose of shewing that, when in 1837 *Thornton* built his house, Sir *John* must have known that he did so in the belief that he would thereby acquire an absolute right for ever against his landlord. I cannot think that the evidence leads to any such inference. Though *Mortimer* was not, so far at least

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as appears, himself possessed of any tenant right property, yet he was the owner of property in *Huddersfield*, and could hardly have been ignorant of a right which, according to the case made by the bill, had prevailed and been acted on for a very long period by more than half the inhabitants of the town. And yet the application he made to Sir *John* was wholly inconsistent with the hypothesis, that the owner of the old buildings, which he thought to be eye-sores, had an absolute right to them independent of his landlord. He evidently supposed that Sir *John* could compel their removal, if he would, otherwise his application was absurd. So again, the conduct and language of Sir *John* are precisely what might have been expected if he thought he had the power to do what was asked of him, and that whether he should or should not comply with the request was a matter depending on his own pleasure. It is inconsistent with the notion that he understood the interest of the tenant to be one with which he had no right to interfere.

The other case in which Sir *John* is said to have personally interfered is that spoken to by the witness *William Brier*. He says, that in the month of August, 1816, he went over to Sir *John* at *Byrom*, carrying with him a plan, approved by the steward, of some land he wished to take for building; that Sir *John* approved the plan, and that, in answer to a question whether he could have a lease, Sir *John* said that a lease was unnecessary, that he should never be disturbed by him, or any *Ramsden*, or something to that effect, which satisfied the witness. Whether, as between Sir *John* and the witness, this might amount to an express contract that he should never be disturbed, is not the point to be considered; and there was certainly no such express contract with *Thornton* in this as in the case of *Mortimer* to which I have just referred. The language is not such as could induce a belief that Sir *John* supposed his tenants to understand that by building they acquired, to them and their representatives for ever, independently of special contract, absolute rights against him, which, so long as they paid their rents, he could never defeat.

Even supposing both these conversations, and any number of conversations to the same effect, to have been known to *Thornton*, and to have been present to his mind when he built his house in

1837, they could not, in my opinion, have tended to encourage the belief on which he says he acted. The obvious meaning of Sir *John*, in both cases, was, not that he could not, but that he would not dispossess the persons holding the land. No such assurance was made to *Thornton*, and the very foundation of his case is, that it was unnecessary, for that the right to possession for ever was created without any special contract by the mere fact of building on land held on what was called tenant right tenure.

I have thought it right to consider to what relief, if any, *Thornton* would be entitled with respect to the first branch of the alleged rights of the holders by tenant right, viz., the right to hold for ever so long as they paid their rent. But it is not on this branch of the alleged right that relief is given by the decree, though perhaps it is its necessary foundation. The relief given proceeds on the other branch of the privileges said to attach to the holders of land held on tenant right, namely, their right to call at pleasure for a sixty years' lease, renewable every twenty years; and what *Thornton* was bound to establish was, that he built, and that Sir *John* knew that he built, in the belief that he had such a right.

The first observation I will make here is, that though there is a great deal of evidence that such a right was generally believed to exist, and though *William Brook* and *John Brook* say generally that *Joseph Brook* used constantly to tell persons taking land for building that they could have leases whenever they desired, yet none of the witnesses who actually took land from *Joseph Brook* in the lifetime of Sir *John* says that he ever made any such statement to him. Several such witnesses were examined, and say that *Joseph Brook* told them that so long as they paid their rent they would never be disturbed; but none of them says that anything like a statement that they could have a lease was ever made. On the contrary, *Matthew Riley* says that when he asked if he could have a lease, *Joseph Brook* said, "No; we don't grant leases." I mention this because I think it extremely doubtful whether any such statement as those spoken to by *William* and *John Brook* as to the right to a lease ever were made. Without attributing to those witnesses the intention to say what they knew to be false, I must yet observe that as no such statements were

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made to the only witnesses examined who actually took land from *Joseph* in the lifetime of Sir *John*, it is by no means improbable that, after a lapse of many years, *William Brook* and *John Brook* may have confounded in their minds what they heard *Joseph* say with what, since the present dispute has arisen, has become the the subject of general discourse.

But it is no part of the Appellant's case to contend that leases would not in general be granted by Sir *John* to persons applying for land, provided only that they were willing to pay a much higher rent; and nothing is more probable than that what *Joseph Brook* said to persons applying for land had reference, not to leases to be granted at a future time, but to a lease to be made in the first instance when the tenancy commenced.

Assuming, however, that the facts are as deposed to by *William* and *John Brook*, and that *Joseph* was in the habit of telling people, when they took land, that they could have leases when they thought fit to call for them, the question is, how does that affect Sir *John?* Where any such statement was made to a person taking land, a question might arise between such persons and Sir *John* whether what so passed amounted to a contract by *Joseph Brook* binding on Sir *John*. No such question is raised, or could be raised, as to *Thornton*, for it is not alleged that any such statement was made when he took his land from *Bower*. As to *Thornton*, the statements said to have been made by *Joseph Brook* to persons taking land are only material so far as they tend to make it probable that they were known to him, and so had led him to believe, when he took his land from *Bower*, that he had thereby a right to call for a lease whenever he should think fit.

What was the belief of any one as to his rights on any particular subject, is a matter not admitting of direct evidence. The reasonable explanation of the conversation which *Thornton* had with *Joseph Brook* when his house was nearly completed, seems to me to be, that he was considering whether it was prudent to trust to what is called the honour of the *Ramsden* family, or whether he ought not to bind them by a lease; not that he supposed he could compel them to grant a lease as a matter of right.

But even supposing *Thornton* to have built in the firm belief that he was entitled to a lease, the important question still remains—

Did Sir *John* know that he was building in that belief? On this point the onus of proof is on the Respondent, and he has wholly failed to satisfy me. In the first place, what was the lease on the faith of a right to which it is argued that Sir *John* knew *Thornton* was building? *Thornton* says it was a lease for sixty years, renewable every twenty years on payment of two years' ground rent as a fine, and that no other lease was at that time known at *Huddersfield*. This is not the nature of the lease to which the decree has declared him entitled; nor is it consistent with the terms of the leases then usually granted on the *Ramsden* estates when leases were granted, the fine on renewal being generally one year's improved value, not two years' ground rent.

But a much more important observation has reference to the rent. What can be the meaning of a person having a right to call for a lease at a rent to be agreed upon between him and his lessor? Suppose they do not agree. It is endeavoured to meet this by saying that the rent could not exceed double the amount of that at which the person applying had been holding as tenant from year to year. But the evidence of the Plaintiff fails to establish any such limit. It is differently given by different witnesses, but I think it is fair to take it from the witness *Frederick Jones*, who had the best opportunity of knowing the general opinion of the place, as he had formerly been one of the solicitors of Sir *John*, and at the time of his examination was the solicitor of *Thornton*. He says: "It was part of the said system, and I have known of many instances, that tenant right holders, or holders at will, as they have been variously termed, might have, and have had, sixty years' leases, renewable every twenty years, for ever, upon such terms with regard to rent as they could bargain for with the agents of the estate; but it was generally understood that such rent would be double the tenant right, unless the agents either had agreed or would agree for a less rent."

Now, supposing all this to have been known to Sir *John*, I do not think it can be treated as amounting to knowledge on his part that his tenants at will were laying out their money in the belief that they had a right to call for a lease perpetually renewable whenever they might think fit. The mere circumstance that the amount of rent remained to be settled by agreement between the

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lessor and the lessee excludes the notion of there being a right to compel the grant of a lease. The statement by *Jones* that it was generally understood that the rent would be double that which had been paid by the lessee as tenant from year to year, unless a lower rate was agreed upon, is far too vague to be the foundation of anything like a claim of right. He does not even say that it was generally understood that the landlord could not insist on a higher rate, but only that he would not; the same distinction to which I have already adverted in dealing with the alleged right to hold for ever, so long as the ground rent was duly paid. If there was nothing else, this absolute uncertainty as to rent seems to make it impossible that Sir *John* could have supposed his tenants at will were building in the belief that they had any right to compel their landlord to grant them a lease.

But another important observation on this part of the case is, that the supposed right is one in which there is no reciprocity. It is not alleged, indeed it is denied, that there was any right in the landlord to compel his tenants from year to year to accept a lease; and yet it is supposed that the landlord was continually making demises from year to year, with the knowledge that those who thus became his tenants supposed they acquired rights against him without his acquiring any corresponding rights against them.

The only evidence which could have satisfied me that Sir *John* knew, or even suspected, that such a belief was entertained, would have been a uniform practice of granting such leases as are represented to have been the right of the tenant at will whenever they were called for; but on this point the evidence wholly fails. There is no evidence that even a single lease was granted in the lifetime of Sir *John*, to any person holding by tenant right, though he was in the enjoyment of the property for at least fifty-nine years. During that long period of time he granted 296 leases, of which 227 were granted before, and sixty-nine after the year 1816; of the 227, five were not renewable leases, but the remaining 222 contained a covenant by Sir *John* to renew at the end of every twenty years on payment of a stipulated fine, or if no renewal was then made, then at the end of forty years on payment of a larger fine.

The nature and amount of the fine varied. In seventeen of the 222, the fine was one year's improved value if the lease was

renewed at the end of twenty years, or ten years' value if renewed at the end of forty years. In 174 the fines were two years' rent if renewed at the end of twenty years, or ten years' rent if renewed at the end of forty years. In the remaining thirty-one the fines were fixed sums, not depending either on the rent or value of the land. The sixty-nine leases granted after 1816, were all renewable leases like the others. Thirty-one of them were renewals of former leases, and the remaining thirty-eight were all made renewable on payment of one year's value at the end of twenty years; or ten years' value at the end of forty years.

It seems to me impossible, in the face of this evidence, to believe that Sir *John* knew that persons taking land on the tenant right tenure, had built or were building their houses in the belief that they were entitled, whenever they thought fit, to call for a sixty years' lease renewable at the end of every twenty years, either according to what *Thornton* says was his belief, namely, on payment of two years' rent, or according to the relief given by the decree, on payment of one year's improved value. Sir *John* could not have understood that any such belief prevailed, knowing as he must, that though he had many hundred tenant right tenants he had never granted a lease to any of them; and, farther, that in the cases in which he had granted leases to persons taking land on lease instead of by tenant right, he had from time to time changed the terms of renewal according to his pleasure.

It does not seem to me to be important that, after the death of Sir *John*, leases were in many cases granted to tenants holding by tenant right. The circumstances under which they were granted do not lead to the inference that Sir *John* knew that buildings were erected in the belief that the persons building could claim a lease as of right, which is the point we are now considering. It is no part of the Appellant's case, that land was not frequently taken for building on the faith that when the buildings were erected a lease would be granted. In all such cases leases were granted. The conversations spoken to by the Plaintiffs' witnesses, invariably shew that it was in general optional with those who took land to take it either with or without a lease. The substance of what *Joseph Brook* is reputed to have said is almost invariably that the applicant might have a lease, but that he would be throwing away his

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money, that it would cause him expense, and materially increase his rent, and that he would be perfectly safe without a lease. Still it is certain that many persons preferred, even at a higher rent, the ordinary security of a lease, which, however, never was granted till the buildings had been completed, or nearly completed.

The mode of dealing with this property being such as I have stated, it was almost certain that at the death of Sir *John* there would be, as in fact there were, many persons who had taken land and were building on it in the faith that, according to the usual practice, they might, when the buildings were completed, have a lease in the form then ordinarily adopted. The will, however, was thought by counsel not to contain powers sufficiently ample to enable his devisees to grant leases in that form. To obviate all difficulties on this head an Act of Parliament was passed in the year 1844, giving to the tenant for life, and to the trustees of the will during his minority, leasing powers, which it was thought had not been effectively created by the will.

The Act, after reciting the will of Sir *John* and his death, proceeds to state that the system of managing the *Huddersfield* estates had been, that no person desirous of taking land on lease for building purposes obtained any written agreement for a lease, but was permitted, after a piece of land had been appropriated to him, to build upon it, upon the understanding that after he had built a lease would be granted to him, perpetually renewable according to the form set forth in the schedule; and that many persons, relying on this system, had, in the lifetime of Sir *John*, erected houses on the faith of leases being granted to them, but no such leases had been granted; and, farther, that since the death of Sir *John*, difficulties had arisen concerning the renewal of leases in pursuance of his covenant for renewal. It is enacted that it should be lawful for the trustees of the will during the minority of the Appellant, Sir *J. W. Ramsden*, and for him after he should attain his majority, to demise and lease to any person who in the lifetime of Sir *John* took land (being part of the estates devised by the will of Sir *John*), on the faith of a lease being granted to him, according to the system aforesaid, and who had erected buildings thereon, by a lease of the same, according to the form mentioned in the schedule. This form was that of a lease for sixty years, renew-

able at the end of every twenty years, on payment of one year's improved value; or at the end of forty years, on payment of ten years' improved value. The 2nd section of the Act authorized the granting of renewed leases which Sir *John* would have been bound by his covenants to grant, and the 3rd and subsequent sections enabled the trustees during the minority, and Sir *John* himself after obtaining his majority, to grant building leases of any of the devised lands, with covenants for perpetual renewal, on terms to be agreed upon.

No leases were granted after the death of Sir *John* until after the passing of this Act; but Mr. *Hathorn*, who, on the death of Mr. *Bower*, in 1844, had become the resident local agent of the Appellant at *Huddersfield*, informs us that after the passing of the Act, and during the minority of the Appellant, thirty leases were granted to persons who were at the times of the grant holding by tenant right tenure. He adds, however, that in the case of fourteen out of these thirty, the parties were entitled to a lease, as they had built on an agreement that they should have a lease when the buildings were completed. All the other sixteen were granted on rents which were materially raised, and not on any claim of right by the parties who obtained them.

What was done after the death of Sir *John* can only be material upon this part of the case, so far as it may throw light backwards on what was the practice in his lifetime; and it seems to me impossible to deduce from what was thus done, in and after the year 1845, under the powers of this Act, anything as to what Sir *John* supposed to be the opinion of those who took land from him without any agreement for a lease. As to many of them, it is clear that they were entitled against Sir *John* to claim a lease. As to the others, the lease was granted as a matter of favour or contract, not as a matter of right, and it has not, therefore, any tendency to support the views of the Respondents. But there were some other leases granted to tenant right holders besides the thirty thus referred to—namely, those granted to persons whose tenant right lands were compulsorily taken by railway companies. The facts as to these persons were as follows:

Some houses in *Huddersfield*, held by persons on the tenant right tenure, were, in the years 1845 and 1846, necessary for enabling

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the proprietors of the *Huddersfield and Sheffield Railway* to make their line. Notices for taking their houses were served on the occupants, but as they were, in the eye of the law, at best, mere tenants at will, a difficulty arose as to the mode in which, and the persons to whom, the purchase-money was to be paid. If the company was to treat them as mere tenants from year to year, the purchase-money, except so much of it as would represent the very small interest of such a tenant, would be payable to the devisees of Sir *John*. But it had always been the practice to recognise these tenants, though at law mere tenants from year to year, yet as holding under an engagement of honour, that so long as they paid their rents they would never be disturbed. This was felt by the trustees to give the tenants a title in honour to receive such compensation as they would have been entitled to if they had derived from Sir *John* a legal title, and not a title depending merely on the honour of the family. It would not, however, have been just to give to them a legal title enabling them to hold for ever at the rents at which they held as tenants from year to year; for in those cases in which a legal title was granted to persons when they took land for building, it had always been done by means of a lease perpetually renewable at a rent much greater than that at which it would have been granted to them if they had taken it as tenants from year to year. The course, therefore, followed by the trustees was to treat these tenants as persons who had built on the faith of having leases, and to fix the rent at the sum at which, if that had been the case, the leases would have been granted. Leases were accordingly granted on that principle, and so the landlords and the tenants became entitled to the purchase-money between them, according to the value of their respective interests.

Sixteen such leases were granted in the year 1846; and *Hathorn*, who was then the local agent at *Huddersfield*, states in his evidence that none of them was granted on the application of the tenant or as a matter of right; and farther, that these leases were entirely exceptional, and all the arrangements connected with them were carried out by Mr. *Fenton*, since deceased, and *Frederick R. Jones*, then the solicitors of the trustees. *Frederick R. Jones* afterwards became the solicitor of the Plaintiffs, and was examined after and in answer to *Hathorn*, but he does not contradict him; and, on the

contrary, states that the scheme of granting these leases originated with the trustees. I am aware that two of the lessees, *Prass* and *Tattersfield*, stated, when examined in chief, that their leases had been granted to them on a claim of right. No other witness confirms this statement, which is wholly inconsistent with what was afterwards sworn, not only by *Hathorn*, but also by *Frederick R. Jones*, the Plaintiff's solicitor; and I find it impossible not to believe that the account given by *Hathorn* is strictly accurate.

Even assuming, therefore, that what was done after the death of Sir *John* could be relied on as tending to shew either what was the belief under which persons taking land in his lifetime acted, or what Sir *John* supposed it to be, I do not think that these leases granted on occasion of the making of the railway throw any light on the subject.

For the same reasons, I attach no weight to the fact that on other occasions, when damage was done to houses held on tenant right, by working mines or otherwise, the compensation was, with the knowledge and approbation of Sir *John* and his agents, paid to the tenants. So, again, local taxes for drainage and other improvements were charged on and paid by the tenants. All this was the necessary consequence of their being treated by Sir *John* as persons whom he felt bound in honour to consider as tenants never to be disturbed, and do not, as it appears to me, tend to support the case of the Plaintiffs.

So far, therefore, as relates to the piece of land held by *Thornton*, in the lifetime of Sir *John*, I do not think it necessary to say more, except only as to a part of the argument at the bar, by which I understood counsel to suggest that it was not necessary to prove actual knowledge in Sir *John* to shew that he knew that *Thornton* built on the faith that he was entitled to a lease whenever he should think fit to call for it, but that if that was known to *Joseph Brook*, Sir *John* would be bound as if it had been known to himself. I think this is a mistake as to the principles of the law of agency. Even if *Joseph Brook* was, what he is not shewn to have been, and what, on the evidence, I do not think he was, a local agent, authorized to create tenancies without referring to *Bower*, still that would not enable him to bind his principal as to matters *dehors* the contract. If he had made it part of the contract with any

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person whom he had accepted as tenant at will that he, the tenant, should be at liberty to call for a lease at his pleasure, then would arise the question, whether this part of the contract was within the scope of the agent's authority? But it is not suggested that any such contract was made with *Thornton*. His case is, that Mr. *Bower*, being a person authorized by Sir *John* to let his land to persons taking it as tenants at will, had let to him, as tenant at will, the land on which he built his house in 1837, and that he had taken it without requiring a lease, fully believing, from what *Joseph Brook* stated to him, and had stated, on numerous other occasions, to other persons, and what had thereby and otherwise become the common reputation of the place, that all persons so taking land were entitled to a lease whenever they should call for it.

Supposing such statements to have been made, however constantly and openly, they would not be binding on Sir *John* unless he had authorized *Joseph Brook* to make them, or else knew that he made them, and that persons taking land acted on the faith of them. If, indeed, the principal knows that persons dealing with his agent have so dealt in consequence of their believing that all statements made by him had been warranted by the principal, and, knowing this, allows the persons so dealing to expend money in the belief that the agent had an authority which, in fact, he had not, it may be that in such a case a Court of equity would not allow the principal afterwards to set up want of authority in the agent. But this equity, whenever it exists, depends absolutely on the fact that the knowledge on which it rests can be brought home to the principal.

Here the contract was made by Mr. *Bower*, on the part of Sir *John*, and by him only. I do not think there is any principle, either of law or equity, which can enable the tenant to say that the rights under that contract against Sir *John* could be affected by statements made by a local agent without the knowledge of, or authority from, either Sir *John* himself, or Mr. *Bower*.

I have now gone through the whole of the case, so far as relates to the land taken for building in the lifetime of Sir *John*, and I have stated my reasons for thinking that *Thornton* had no title, legal or equitable, beyond that of a tenant from year to year; that

his claim to continue to hold so long as he paid his rent, as well as his claim to have a lease, rested entirely on the pleasure of Sir *John*, and on what he and those who derive title through him may think proper to concede.

It remains only that I should consider the claim so far as it relates to the tenancy created after the death of Sir *John*, as to which I need not detain your Lordships long. The observations I have made on the tenancy created in the lifetime of Sir *John* are all applicable to this second taking; besides which, there are other reasons which, as it appears to me, shew that the Plaintiffs were not entitled to the relief given by the decree, or to any relief at all.

The undisputed facts as to this part of the case are as follows: In the month of June, 1845, *Thornton*, being desirous of obtaining more ground for the purpose of adding some outbuildings to his house, applied for that purpose to Mr. *Hathorn*, who, on the death of Mr. *Bower*, in 1844, had been appointed a resident agent for managing the property under Mr. *Loch*, who had succeeded Mr. *Bower*. Previously to this time a very proper system had been introduced in the management of this property, under which every person applying for land to be held by him not on lease was required to make his application in writing, stating expressly that he applied for it to be holden by him as tenant at will; and printed forms for this purpose were kept at *Longley Hall*, where the business of the estate was managed. When *Thornton* applied to *Hathorn* for the additional land, one of these forms, properly filled up, was put into his hands for his signature, and he signed the same. I have already mentioned its exact form and contents.

Hathorn, having obtained the consent and approbation of Mr. *Loch*, sent to *Thornton* a letter of advice, as follows:

"*Longley Hall, Huddersfield,*
"24th July, 1845.

"Sir,—I beg to inform you that the plan of the ground on which you propose to erect a mistal, stable, &c., at *Paddock*, to be held at will, has been approved of and signed by Mr. *Loch*. The quantity of ground to be occupied by you will be 165 square yards, which, at the rate of 1*s.* $\frac{1}{2}$*d.* per yard, will make the amount of the annual ground rent payable by you to the trustees of Sir *John William*

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Ramsden, Baronet, £1 0*s.* 7*d.* The first half-year's rent will be payable at November rent-day, 1846. As soon as your building has been completed, I will thank you to come here, for the purpose of having your name regularly entered in the rental of this estate.

"Your obedient servant,
"*Alex. Hathorn.*"

The ground was properly staked out. *Thornton* erected his new buildings, and was entered on the rental at *Longley Hall*, and he afterwards duly paid his rent from time to time as it became due.

That he thereby became at law tenant to the trustees from year to year, and for no greater interest, is clear; but he insists on the same equity on his second as on his first tenancy, namely, that he was entitled to treat this tenancy at will as giving him, against Sir *John* and the trustees, an absolute right to call for a sixty years' lease, perpetually renewable. The decree of the Vice-Chancellor proceeds on the ground that he was so entitled, but I am quite unable to understand the principle on which this relief was given. Even if, contrary to the opinion I have formed, the facts had warranted the conclusion that Sir *John* was bound to consider all persons entered as tenants at will, or from year to year, on his rent-roll, as being entitled to call for such a lease as *Thornton* required, still I cannot comprehend how any such equity can affect the Appellant, Sir *J. W. Ramsden*, with respect to tenancies at will created by his guardians after the death of Sir *John*. Every precaution was taken to shew to persons who took land after the death of Sir *John* that they were mere tenants at will. They were always required to sign an application for land to be held by them as tenants at will, and *Hathorn* says that the words "tenants at will" were printed in large conspicuous text characters, so that they could not be overlooked. *Thornton*, indeed, says that, though he signed the application, he had no opportunity of making a copy of it. He does not suggest that he did not read and perfectly understand it; and *Hathorn* says he might have had a copy if he wished for it. Add to which, that in the answer which he retained, or might have retained, he was expressly told that he was to hold as tenant at will, at a rent then fixed by the lessors. I consider it, therefore, to be established beyond doubt that he knew that his title was

merely that of a tenant from year to year; though I also firmly believe that he thought, in regard to this second hiring, as in regard to the former, that he might safely rely on what was called the honour of the *Ramsden* family; for the evidence shews that this feeling prevailed after the death of Sir *John* no less than during his life. I will not repeat what I have already said, namely, that no Court can take cognizance of claims founded only on what is considered an engagement of honour.

On these grounds I think that the claim of *Thornton* to a lease of this second piece of ground is at least as untenable as that relating to the former.

I will only add, that the conduct of *Thornton* when, in 1857, he surrendered the property to the Appellant, Sir *J. W. Ramsden,* for the purpose of the mortgage to *Dyson,* and caused the names of himself and *Dyson* to be entered as tenants at will, strongly confirms the view I have taken of the case.

The decree of the Vice-Chancellor declares the Plaintiff *Thornton* entitled to a sixty years' lease, renewable every twenty years on payment of the fines mentioned in the schedule to the Act of Parliament, *i.e.*, a fine of one year's improved value. Even if all other difficulties were removed, I cannot understand how the Plaintiff could be entitled to a lease on these terms when his case, as made by the bill, is, that he was entitled in equity to a sixty years' lease, renewable every twenty years on payment by way of fine, not of one year's improved value, but of two years' ground rent. The mere circumstance of the uncertainty as to what the terms of renewal were to be, affords cogent evidence against any claim of right whatever.

The Plaintiffs, in my opinion, have wholly failed; and I shall here dismiss the case, with one observation, however, as to the claim based on the reliance placed on the honour of the *Ramsden* family.

It is not my intention to step out of the line of my duty by expressing or even forming an opinion as to how far this claim is well founded. Probably the system was originally adopted in the notion that it would give to a humble and not generally wealthy body of dependent tenants an easy and cheap mode of holding and disposing of their houses. It was impressed on them that by

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means of the register kept in the books at *Longley Hall* they could sell, mortgage, or dispose of the property, so far as they had property in their houses, by will, at an expense of 2*s.* 6*d.*, instead of many pounds. Now, whatever obligations of honour the mode in which this property was managed may have created in the *Ramsden* family, I confess that this case has satisfied me that it was absolutely necessary, for the interest of all parties, that some mode should be adopted for putting an end to it. It was an attempt to create a new and cheap mode of conveyancing, which was certain, sooner or later, to involve in difficulties those who had relied on it. The supposed transfers were altogether ineffectual, and it is a subject of wonder to me that litigation was not long ago occasioned by it. The present Appellant endeavoured to do what he thought fair and just, by obtaining powers to grant leases for ninety-nine years. Whether that was more or less than his tenants at will had a right to look for from what they call the honour of the family is a point on which I give no opinion, but that some arrangement should be adopted which should put an end to the system hitherto pursued seems to me absolutely indispensable.

In my opinion the Plaintiffs did not establish a title to any relief, and so that their bill ought to have been dismissed.

In the particular circumstances of this case, and not at all relying upon the fact that I know that the opinions of your Lordships are not unanimous, which I think is no ground for influencing your Lordships' judgment on the question of costs, but in consideration of the circumstance that this system has gone on so long, and that the parties might have thereby been misled as to what they supposed to be their rights, I shall advise your Lordships to remit the cause to the Court of Chancery, with the declaration that the bill ought to have been dismissed, without saying anything as to costs.

My Lords, I ought to have said that I have had more than one communication on the subject of this case with Lord *Brougham*, who was present at the hearing, but is unable to attend here to-day, and he has desired me to say, that having communicated with me and my noble and learned friends on the subject, he entirely concurs in the views which I have expressed.

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LORD WENSLEYDALE:—

My Lords, the questions in this case arise upon two transactions, one between Mr. *Thornton*, under whom the Respondents claim, and the late Sir *John Ramsden*, then the absolute owner of this part of the *Huddersfield* estate in fee, with respect to a piece of waste land alleged by the Respondents to have been taken by Mr. *Thornton* from the agent of Sir *John* in the year 1837, on which Mr. *Thornton* built a house, and expended a sum of more than £1800 in so doing, and the second on the 10th of *June*, 1845, when he made application to Mr. *Hathorn*, appointed as manager of the estates by Mr. *Loch*, the agent of the trustees and guardians of the Appellant, Sir *J. W. Ramsden*, for an additional plot of ground for building a mistal connected with the first-mentioned piece of land.

The two pieces of land in question were part of the unsettled lands belonging to the grandfather of the Appellant, Sir *John Ramsden*, in fee, and were formerly part of the common and waste lands of the manor. He was the owner in fee simple to the time of his death in 1839. The Appellant Sir *John W. Ramsden*, his grandson, succeeded under his father's will, and attained his majority in September, 1852.

The questions in this case to be considered are, first, whether as to the first transaction Mr. *Thornton* made with the late Sir *John Ramsden* any contract binding, in law or equity, on his successor, the Appellant, which can be enforced against the Appellant, and, if not, whether the Respondents have any equity to oblige the Appellant to make good, by a lease, or otherwise, the loss sustained by Mr. *Thornton*, under whom they claim, by expending money in building a house by his licence; and, secondly, similar questions are to be decided with respect to the second take of additional land in the year 1845 for the mistal.

In the first transaction, that alleged to have taken place in 1837, *Thornton* informed Mr. *Brook*, an alleged agent of the late Sir *John Ramsden*, that he wished to build a house on a part of the waste land. It was agreed to by Mr. *Bower*, the acknowledged agent of Sir *John*, and the amount of the ground rent was fixed by the agent at £4 per annum.

On taking this piece of land it is alleged that Mr. *Thornton* asked

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the alleged agent of Sir *John Ramsden*, Mr. *Joseph Brook*, his opinion as to the prudence of taking a lease or not of the land and buildings, and Mr. *Brook* assured him that it would be folly to have a lease when he was equally safe and secure without a lease as with one, and that he could get a lease whenever he wanted one.

The Appellant disputed the date of the first application. *Thornton's* name as tenant of the first take does not appear in the roll of the tenant right holders of the *Ramsden* estate (already explained by my noble and learned friend on the woolsack) till the year 1843; but it does not seem to me to be material to determine the precise date of the first application. The house and improvements were completed by Mr. *Thornton*, and he went to reside in the house in the early part of 1839, and he was entered on the roll as tenant at £4 a year in 1843. *Thornton* occupied, and in 1845 applied to the trustees of the estate of Sir *John W. Ramsden*, the Appellant, and his guardians, to take an additional piece of land for a mistal. Both these pieces of land were taken without any express agreement for a lease. The rent fixed for a lease, or an agreement for a lease, was always higher than that which was fixed for a simple tenant right holding.

A bill was filed by the Respondents against the Appellants on the 12th of April, 1862, and the case was fully argued before the Vice-Chancellor *Stuart*. His Honour pronounced a decree in favour of the Respondents, not on the ground that this was a case of a claim for specific performance, nor did the bill pray relief on that ground, but that it proceeded upon a recognized equity, much higher and more positive than the discretionary and ordinary equitable jurisdiction for specific performance, His Honour thinking that in the case of the permission to build the house given by the acknowledged agent of Sir *John Ramsden* in the year 1837, and by the trustees and guardians in the case of building the mistal in 1845, a lease ought in equity to be given to indemnify the tenants. His Honour seems to have thought that it would be a sort of breach of faith and a fraud on the part of the owners if they did not grant leases, and he thought they ought to do so, and that he was warranted in ordering a lease for sixty years at the double of the rent then payable.

Whether this decree for the Respondents can be supported upon

the ground stated by the Vice-Chancellor, is the important question in this case.

The case is of some interest with regard to the principle it involves, and of great importance, as it affects a very large and valuable property in the district of *Huddersfield*, with respect to which very similar questions may, no doubt, arise. It was argued for several days in your Lordships' House by very able and learned counsel on both sides. The minutest parts of the case have been investigated with great care, and the long lapse of time since the argument has enabled us to consider the whole case very carefully. I have satisfied myself that the opinion of my noble and learned friend on the woolsack, which he has just delivered, that the bill ought to be dismissed, is perfectly correct.

I am of opinion that the Plaintiffs cannot support their case, either at law or in equity.

To consider the case without, for the present, adverting to the ground of the Vice-Chancellor's decision, it is perfectly clear that the Respondents could not succeed on the ground of a manorial custom affecting the tenure of those lands, analogous to a copyhold custom. The alleged practice is comparatively quite modern, nor has that view of the case, very properly, ever been brought forward on the part of the Defendants in Error.

Nor has any express or implied contract on the part of the landlord been made out by the evidence.

Certainly there was no contract in writing by the landlord, or an agent competent to bind him, either express or implied, so as to bind the landlord at law. Nor was there, I clearly think, any evidence of an express or implied parol contract, which being afterwards partly performed, would be binding, notwithstanding the provisions of the *Statute of Frauds*.

On the part of the Respondents, it was contended that *Thornton* took under what is termed the "tenant right" system in the manor, which existed only, or arose, in the time of Sir *John Ramsden*, and is alleged to have been, that the person who took land to build upon, and did build to the satisfaction of the lord or his steward, was entitled to hold at a certain rent, and also, whenever he pleased to ask for it, to have a lease from the lord of the manor for sixty years at the rent fixed for a lease at the time of the being

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allowed to build by the lord or his steward, or if not then fixed was to be afterwards fixed, and the lease to be renewable at stated periods upon the payment of a fixed fine. It does not appear that any lease was ever given, as far as I can collect, to any person claiming on the ground of this tenant right, and as being entitled thereby, by Sir *John Ramsden* himself, or in his time.

To my mind there would be very great difficulty in making out that any such implied contract could be construed to have arisen on the part of the landlord. Sir *John Ramsden*, the proprietor in whose time the usage originated, does not appear to have granted any leases under this usage. But even if there had been a practice of granting leases, prevailing for a very long period of time, by the landlord who was owner in fee, and might grant any leases of any description that he pleased to any person he pleased, with any terms, it would be very difficult indeed to convert that practice into an obligatory custom or usage, especially in those cases in which the alleged custom itself contemplates a future important matter, which was left open to future agreement, namely, the amount of rent to be paid and other matters to be fixed under the lease to be granted. A thousand instances of the grant of leases, all of which may be referred to kind feeling on the part of the landlord, which will explain every part of this case (and which, I sincerely hope, will, whatever the result of this suit may be, continue still), would prove nothing. It appears to me to be perfectly out of the question to hold that there was a contract to grant a lease, the most important terms of which—the amount and time of payment of the rent to be paid—were not stipulated, and which would be naturally the subject of a fresh agreement. If a verbal statement to the like effect had been made by Sir *John Ramsden* himself to *Thornton* before he began to build, the precise terms being clearly in the power of Sir *John Ramsden* to fix, all that could be said would be that the rent and precise terms would in such case be left to the honourable feelings of Sir *John Ramsden*, and not create a legal obligation. I cannot see how he could be considered to have made any complete contract at all, still less is there any ground to imply on the part of the landlord an agreement that until the lease was granted the tenant was to hold as an irremovable tenant for ever at the lower rent at which he held the

property as tenant at will, which was suggested in the course of the argument.

To me the evidence is quite satisfactory that *Thornton* took, in both instances, as tenant at will, both in point of law and in equity; and every claim beyond that can only be on the honourable feelings of the Appellant.

On giving up the first take to the *Commercial Club*, on the 30th of September, 1857, he then acknowledged himself to be tenant at will in distinct terms, and at such rent as he, the landlord, would think proper. At the take of the mistal, on the 26th June, 1846, he takes it, in like manner, expressly as tenant at will from the trustees and guardians.

Afterwards, on the 16th of October, 1856, *Thornton* writes to Mr. *Hathorn* to know the conditions on which Sir *J. W. Ramsden* then granted leases, and how much per yard he should be charged for a house, if leased, as he thought of having a lease; which shews, distinctly and decidedly, that he did not then consider that he was in the condition of a leasehold tenant, or tenant having a right to a lease; and, therefore, there certainly was no mistake in stating himself to be tenant at will of the land in the first take, when transferring it to the *Commercial Club* in 1857.

These circumstances form a very strong case against the Plaintiff, which is, in my mind, entirely unanswerable at law.

The words "tenant at will" were undoubtedly meant by the landlord to be understood in their proper legal sense, and must be taken to have been understood by the tenant to mean what they imported. There cannot be, I think, the slightest doubt upon this part of the case.

Before adverting to the most important question, it remains shortly to notice an argument brought forward on the part of the Respondent. It appeared that in 1845 the trustees of the *Ramsden* estate permitted some tenants whose holdings were required by some railway companies, and who held under the tenant right system, to receive from such companies compensation for the buildings, as if occupying them on the footing of being entitled to leases thereof; and the guardians of the Appellant granted leases to them under the Act of 1844 for the purpose of enabling them to claim such compensation. This was purely as a matter of favour to the

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individuals to whom it was granted, and not an acknowledgment of liability on the part of the trustees and guardians. I am quite satisfied that there was no contract, express or implied.

But the most material and more doubtful question remains to be considered, viz., whether the ground on which the learned Vice-Chancellor has proceeded can be supported; whether there is sufficient proof of that species of fraud committed by Sir *John Ramsden*, or the other Appellant, on which His Honour relies.

This fraud is in the nature of a personal fraud in Sir *John Ramsden* as to the transaction in 1837, and in the devisees and guardians in that of the year 1845; and a doubt has certainly passed through my mind whether that fraud, if it was a fraud, was not merely personal, and could in any way affect the estates in respect of which it was committed, in the hands of one to whom it was afterwards transferred, though a mere volunteer. But this point has not been argued, and I will assume that my doubt is unfounded, and that if Sir *John Ramsden* was guilty of the personal fraud alleged, the loss occasioned by that fraud might be satisfied out of the estate itself of the person guilty of the fraud against the Appellant, who is not a purchaser for a valuable consideration, but a mere volunteer. But I still feel a difficulty how the personal fraud of the trustees and guardians, who were not absolute owners, can affect the right of the Appellant, Sir *John W. Ramsden*, who does not claim under them.

But it is not necessary to consider this point, for I entirely agree with my noble and learned friend on the woolsack, that personal fraud of this nature on the part of Sir *John Ramsden*, or his trustees and guardians, on the Respondent cannot be made out in this case.

If a stranger build on my land, supposing it to be his own, and I, knowing it to be mine, do not interfere, but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards to interfere and take the profit. But if a stranger build knowingly upon my land, there is no principle of equity which prevents me from insisting on having back my land, with all the additional value which the occupier has imprudently added to it. If a tenant of mine does the same thing, he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build.

In this case the Respondent had most clearly, and to his own knowledge, nothing but an estate at will in both the first and second take, changed afterwards by the payment of annual rents, to tenancies, in both takes, from year to year. He has been most distinctly and clearly told that he was to be tenant at will, and he most clearly understood so. I have already stated that there was no agreement with the landlord for any farther estate or interest; but if it could have been shewn on the part of the Respondent that the landlord, Sir *John Ramsden*, with respect to the first take, and the trustees and guardians in the second take, believing the tenant to be ignorant of his rights, had purposely allowed him to go on, the case might fall within the same principle as a case of fraud. But no such case has been made out to my satisfaction. There is no expression, encouragement, or conduct, on the part of Sir *John Ramsden* himself which ought to raise that suspicion. Those on the part of Mr. *Hathorn* which have been given in evidence are all explained by his confidence in the honour and kind feeling of Sir *John Ramsden* and his family. Mr. *Hathorn* was only a sub-agent, and declarations made by him could not affect Sir *John Ramsden* or the proprietors, as those of an agent who had full power to manage the estate, and sell or demise it of his own authority, whose acts would be the same as those of Sir *J. Ramsden* himself would be. He was clearly a subordinate to Mr. *Loch*, if Mr. *Loch* indeed had any such power, which I much doubt. Those made by Mr. *J. Brook* are open to the same observation. He was not an agent with full power to manage the estate, to sell and demise it of his own authority, so as to make his statements equal to those of Sir *John Ramsden* himself; and *Brook's* observations, made at the time of the first take, were only an expression of the agent of his confidence in the kind and liberal disposition of Sir *John Ramsden* and his family. As to statements and declarations made by Sir *John Ramsden* himself bearing on this part of the case, they are only two: one was what passed in the presence of a person named *Mortimer*; the other spoken to by one Mr. *Bryer*, when Sir *John* said the tenant should never be disturbed. These related to different transactions than those in question, and are strictly inapplicable to it, as Sir *John Ramsden* might have reasons for approving of one demise and not another; and even if they applied

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to *Thornton's* take, they amounted to no more than the expression of kind feeling on the part of the landlord of his own liberal intention, and were not obligatory on him in point of law or equity as a promise. If a man expressly promise upon his *honour*, his promise does not create an obligation in point of law. If what he says must be so understood by those to whom it is addressed, it cannot amount to more, and creates no obligation in point of law. The assurance of agents of their confidence in the honour of their principals and their family cannot carry the case any farther.

I have satisfied myself that this is the true view of the case, and that no liability has been proved on the Appellant in any way, at law or in equity, which is all that we, in the course of our duty, have to decide. What the Appellant, Sir *J. W. Ramsden*, may choose to do, if he succeeds in this suit, is entirely for himself to decide; his obligation, if any, being one binding only in honour.

LORD KINGSDOWN:—

My Lords, I regret that in a case of so much importance as this is there should be any difference of opinion amongst us as to the proper decision of it, and I should have been glad, if the practice of your Lordships' House allowed me, to withhold the expression of my dissent from the order proposed by the Lord Chancellor. But having submitted, in writing, very fully to your Lordships the grounds of my opinion, without any success, it is unnecessary, and I think it would not be useful, that I should do more on the present occasion than state in a very few words what I understand to be the law upon the subject, and the effect generally which the evidence has produced on my mind.

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The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation.

This was the principle of the decision in *Gregory* v. *Mighell* (1), and, as I conceive, is open to no doubt.

If, at the hearing of the cause, there appears to be such uncertainty as to the particular terms of the contract as might prevent a Court of equity from giving relief if the contract had been in writing, but there had been no expenditure, a Court of equity will nevertheless, in the case which is above stated, interfere in order to prevent fraud, though there has been a difference of opinion amongst great Judges as to the nature of the relief to be granted. Lord *Thurlow* seems to have thought that the Court would ascertain the terms by reference to the Master, and if they could not be ascertained, would itself fix reasonable terms. Lord *Alvanley* and Lord *Redesdale*, and perhaps Lord *Eldon*, thought this was going too far; but I do not understand any doubt to have been entertained by any of them that, either in the form of a specific interest in the land, or in the shape of compensation for the expenditure, a Court of equity would give relief, and protect in the meantime the possession of the tenant.

If, on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of law or equity can enforce. This was the principle of the decision in *Pilling* v. *Armitage* (2), and, like the decision in *Gregory* v. *Mighell*, seems founded on plain rules of reason and justice.

The whole question, I think, in this case, is, within which class does the present claim fall; a point which, of course, depends entirely on the effect of the evidence. The evidence, in my opinion, shews that it falls under the former. The course adopted by Sir *John Ramsden*, on letting his land, was this: He lived himself at some distance—about thirty miles—from *Huddersfield*. He had a principal agent or steward, Mr. *Bower*, who lived near him, and sub-agents, or persons in his employ, who resided at *Huddersfield*. If any person desired to take a plot of land for building, he applied to the steward or one of the sub-agents, and if the application was

(1) 18 Ves. 328. (2) 12 Ves. 78.

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approved, the piece of ground required was measured and staked out, and the rent fixed. The applicant then took possession, and built his house, on the completion of which, and not before, he was charged with rent, and was entered as a tenant on the rent-books of the landlord.

Thus far there is no controversy between the parties on this record. The question is, what were the terms held out on behalf of the landlord, and on the faith of which the tenants invested their money? The Appellant insists that the persons thus taking land, and building on it, were of two classes—those who originally contracted for the leases, and those who preferred to hold at lower rents, without lease. He admits that the persons of the former class were entitled to leases renewable for ever on certain terms, but he insists that those who did not originally contract for leases were not entitled at any time afterwards to have such leases granted to them; that they were mere tenants at will in the ordinary legal acceptation of the term; had no right whatever, legal or equitable, against their landlord, but might, as soon as they had completed their buildings, be turned out of them, without any compensation or allowance for their expenditure.

The Respondents, on the other hand, maintain that there was no such distinction as is alleged in the original contracts for land; that those who built and entered on their land without leases, at lower rents, did so on the assurance that they might have leases whenever they required them, and that in the meantime they should not be disturbed in their possessions, or, at all events, not without full compensation.

There is contradictory testimony upon these points; but it appears to me that the preponderance is in favour of the Respondent.

I am unable to reconcile with the Appellant's hypothesis of distinct contracts for leases, what was done under the Act of 1844, the grant of renewable leases in 1846 to twenty or thirty persons, as to whom there is no evidence that any of them had specially contracted for leases, or the language held by Mr. *Loch*, in 1851, when the tenants were alarmed by the apprehension that they would be required to take leases. Unless the tenants at will were entitled to leases, there was no power to grant them under the Act. With respect to the letter signed by *Thornton*, on the application for the

second taking, in June, 1845, more reliance was placed upon it in the argument at the bar than I think it was entitled to. The whole force of the observation consists in the use of the words "to hold as tenants at will," which it is said must mean what the words in their legal sense import. The Respondents contend that these words were used just as they are used in copyholds, tenant at will of the lord, according to the custom of the manor; that the lands, though not copyhold, were dealt with very much in the manner in which copyholds are dealt with; that the tenant's title consisted in an entry of the name of the taker as tenant in the books of the lord; and that the transfer was made by a similar entry in the same books; and that the term "tenant at will" was used merely to distinguish those who had no leases from those who had leases. I confess that a reference to the rentals in evidence appears to me strongly to confirm this view.

It was argued, that whatever might have been the original position of the parties, the papers which were signed in 1857, on the occasion of the loan made by the *Commercial Inn Money Club*, had the effect of clearly making *Thornton* a tenant at will. Having regard to the circumstances under which they were signed, I can attribute no weight to these papers. No notice was given to the Respondents that any change whatever was intended to be effected in their position by these papers; and it seems to me that no such change could be effected. By the hypothesis, these gentlemen, the one as tenant and the other as mortgagee, were entitled to a substantial interest in the property, and yet, without any consideration whatever of any kind, they are supposed to have voluntarily converted themselves into tenants at will in the strict sense of the term, liable not only to have their rents raised from time to time, as the landlord might think fit, but to be turned out of possession whenever he pleased.

It seems to me that the right of the parties in this case must be decided in just the same way as if these two papers had never been signed.

I have thus slightly indicated the reasons which induce me to think that the Respondents have made out a case for relief of some kind in a Court of equity. Whether it should be of the kind given by the decree complained of, or in a different form, would, if

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it were material to consider it, be a very difficult question. But the opinion of the majority of your Lordships makes any consideration of that question unnecessary. Much as I regret that opinion, and the consequences which must flow from it, I am, of course, quite satisfied that it is much more likely to be right than any that I am able to form.

LORD WESTBURY:—

My Lords, it would hardly be possible for me, at this late hour, to state in detail to your Lordships the reasons why I feel myself compelled, though reluctantly, to concur in the opinion which has been expressed by my noble and learned friend on the woolsack. But it is unnecessary that I should add anything to the clear and, to my mind, satisfactory statement of reasons which has been made by the noble and learned Lord. I shall, therefore, dispense with reading the opinion which I had prepared, inasmuch as the arguments which I should have submitted to your Lordships are substantially the same as those of my noble and learned friend, who has already expressed them in the clearest manner. I agree also in the opinion which he has expressed, that this bill should be dismissed without costs. Unquestionably, I do not believe that the Appellant desires that costs should be given; but whether that is so or not, I think your Lordships will act rightly in reversing the decree appealed from, and dismissing the bill without costs.

Decree reversed; cause remitted to the Court of Chancery, with a declaration that the bill ought to have been dismissed.

Lords' Journals, May 11, 1866.

Solicitor for the Appellant: *T. W. Nelson.*
Solicitor for the Respondents: *H. B. Clarke.*

ARTHUR MARTIN . . . . . APPELLANT;

AND

ELIZABETH HOLGATE . . . . . RESPONDENT.

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May 8; June 1.

Will—Gift, original and substitutional—"Issue"—"Then be dead"—Costs.

A testator devised his estate and effects to trustees to pay the proceeds to his wife for life, and "after her decease, to distribute and divide the whole &c., amongst such of my four nephews and two nieces" (naming them) "as shall be living at the time of her decease; but if any or either of them should then be dead, leaving issue, such issue shall be entitled to their father's or mother's share":—

Held, that "issue" here meant children; and that the words, "should then be dead leaving issue," meant, should before then have died leaving issue.

Three of the nephews died in the lifetime of the testator's widow, two of them without ever having had a child, one of them leaving a daughter. This daughter, likewise, died before the widow:—

Held, that the gift to the children was original, not substitutional, and that this daughter, upon her father's death, took a vested interest in the share which, if he had survived, he would have taken.

The fact that the gift to the parent was contingent did not affect the nature of the gift to the issue, which was an independent bequest.

As previous decisions were conflicting, costs were ordered to come out of the estate.

THIS was an appeal against a decision of the Master of the Rolls (1).

William Jennings, on the 8th of February, 1850, made his will, by which he gave his property to trustees upon certain trusts, not now necessary to be referred to, and then disposed of the residue as follows: "And as to the rest, residue, and remainder of my said estate and effects, in trust to pay over the annual proceeds thereof unto my dear wife, *Susan Jennings*, for and during the term of her natural life; and from and immediately after her decease, *to distribute and divide* the whole of my said residuary estate and effects unto and amongst such of my said four nephews and two nieces—namely, *Joseph Crew Jennings*, *Thomas Robert Jennings*, *Edwin Jennings Martin*, *Arthur Martin*, *Elizabeth Holgate*, and *Ellen Jennings*—as shall be living at the time of her decease, in equal shares and proportions as tenants in common, and not as joint

(1) 34 Beav. 79, *nom. Holgate* v. *Jennings*;

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tenants; but if any or either of them *should then be dead, leaving issue*, then it is my will and meaning that such issue shall be entitled to their father's or mother's share, but in equal proportions."

The testator died in January, 1854; *Thomas Robert Jennings* had died in March in the previous year, 1853, without issue; *Joseph Crew Jennings* died in March, 1854, likewise without having had issue; *Edwin Jennings Martin* died in September, 1855, but he left issue one infant child, *Augusta Mary Martin*; she died in December, 1863. The testator's widow died in October, 1864, leaving the nephew, *Arthur Martin*, and the two nieces, *Elizabeth Holgate* and *Ellen Jennings*, her surviving.

In January, 1865, *Elizabeth Holgate* presented a petition praying that the residue might be divided into thirds, and paid to the three surviving residuary legatees. The Appellant, *Arthur Martin* (the personal representative of the infant, *Augusta Mary Martin*) and *Ellen Jennings* had obtained orders, giving them liberty to attend the proceedings on this petition. They did so, and *Arthur Martin* put in a claim to the share of *A. M. Martin*, deceased. The cause came on for hearing before the Master of the Rolls, who on the 6th of December, 1864, made an order, by which, among other things, it was declared "that the said *Augusta Mary Martin*, the daughter of *Edwin Jennings Martin*, did not take any share of the residuary estate of the testator; and that the said residuary estate was divisible into three equal shares, whereof one belonged to *Arthur Martin* absolutely, one other share was subject to the trusts for the benefit of *Elizabeth Holgate*, &c., and the remaining share was subject to the trusts for the benefit of *Ellen Jennings*, as in the will mentioned." *Arthur Martin* appealed against this part of the order.

Mr. *Baggallay*, Q.C., and Mr. *Lovell*, for the Appellant:—

In the judgment of the Master of the Rolls, it was suggested that an appeal to this House was necessary to settle the conflicting decisions of the Courts below (1). The Master of the Rolls pro-

(1) In *Lanphier* v. *Buck*, Vice-Chancellor *Kindersley*, referring to these conflicting decisions, said: "I think that the present Master of the Rolls, and Lord Justice *Knight Bruce*, are generally disposed to hold that the issue, in order to take, must survive the happening of the event which terminates the pre-

ceeded chiefly on his own previous decision in the case of *Corrie's Will* (1). In the first place, the word "issue" throughout this will must be taken to mean "children," for they are expressly declared entitled to their father's or mother's share. What issue are to take? Such as are before referred to, and they are the issue, the children, of parents mentioned in the will, including those who are dead. To give a different meaning to the will qualifying words must be introduced into it, and contingencies never thought of by the testator must be assumed. In *Lyon* v. *Coward* (2), under similar words, the grandchildren were, by Vice-Chancellor *Shadwell*, held to take a vested interest on the death of the parent, The Vice-Chancellor of *England* refusing there to apply to the grandchildren the words "at the decease of my wife," those words being on the face of the will connected only with the testator's children, and not with the grandchildren. So in *MacGregor* v. *MacGregor* (3), Vice-Chancellor *Knight Bruce* to the words "in case none of my children shall leave any issue" gave the construction of, leave at any time, not leave at the time of the death of the last surviving child. In *Barker* v. *Barker* (4) the trusts were to pay to *A.* for life, and after her death to divide the principal between the children of *A.* who should be living at the time of her decease, and the lawful issue of such of them as should be then dead leaving issue, so that the issue of such child so dying should take the share which the deceased's parent would have taken if living. There were children of *A.*, two sisters and a brother; the brother died before the death of *A.*; his children were, by Vice-Chancellor *Parker*, held to take vested interests. That decision was founded on considerations of principle: the two cases,

ceding limitation, although the Master of the Rolls, in *Thompson* v. *Clive* (23 Beav. 283), and Lord Justice *Knight Bruce*, when Vice-Chancellor, in *Barker* v. *Barker* (5 De G. & Sm. 753), did not exclude such issue. On the other hand, I consider that the late Vice-Chancellor of *England*, the Lord Justice *Turner*, the Vice-Chancellor *Stuart*, and the Vice-Chancellor *Wood*, have held that the issue need not survive the happening of the event which terminates the preceding limitations, in order to take. And to these may be added Lord *Langdale*, although in *Bennett* v. *Merriman* (6 Beav. 360) he excluded the issue who died before the happening of the event, on the ground of the special wording of the will, and even then expressing much doubt."

(1) 32 Beav. 426.
(2) 15 Sim. 287.
(3) 2 Coll. Ch. C. 192.
(4) 5 De G. & Sm. 753;

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Lyon v. *Coward* and *MacGregor* v. *MacGregor*, were not cited there. Vice-Chancellor *Parker* said that it was the rule not to import a contingency into cases of the kind, that the words of that will did not introduce a contingency, so that after "issue," the words "living at the death of the tenant for life" must be imported into the will to give it such a contingent meaning, and he declined to import those words into the will. So in *Re Wildman's Trusts* (1), the words were to the daughter *Sarah* for life, and after her decease to go to all the children of the testator's daughter who should be living at the time of her decease. He made similar provisions as to his other daughters, and then directed that in case of the decease of any one of his four children without issue under twenty-one, the share of the one so dying should be paid to the survivors; but in case of the decease of any one of them under that age leaving issue, the share or part to which the parent would have been entitled if she had attained twenty-one, should go to such issue on attaining twenty-one. Vice-Chancellor *Wood* in that case referred to what he had already decided in the case of *Bennett's Trusts* (2), and followed, as he had done there, the decision in *Barker* v. *Barker*. In *Pell's Trusts* (3) the fund was given to the widow for life, then to seven sons and daughters, or such of them as should be living at her death, and the issue of such of them as should be then dead leaving issue; the issue not to take larger shares than their respective parents would have taken if living. One of the sons and that son's child both died in the lifetime of the widow, but that child was held by Vice-Chancellor *Stuart*, and afterwards by Lord Justice *Turner*, to take a vested interest, so that her representative was entitled to a share in the fund. There the Lords Justices differed, as they had done already in *Kirkman's Trusts* (4), where, upon similar words, Lord Justice *Knight Bruce* had held that only those grandchildren who survived the tenant for life could take. *Bennett* v. *Merriman* (5) appears to be adverse to the Appellant; but there qualifying words were assumed, which, it is submitted, ought not to have been done. The words "then living," which did apply to the

(1) 1 J. & H. 299. (3) 3 De G. F. & J. 291.
(2) 3 K. & J. 280. (4) 3 De G. & J. 558.
(5) 6 Beav. 360.

testator's children, were, contrary to the principle declared in *Lyon* v. *Coward*, extended to the grandchildren; and it was held that they took by substitution, and that to entitle them to do so they must survive the tenant for life. The same rule was not adhered to by the same learned Judge in *Masters* v. *Scales* (1), where the bequest was to *H. S.* for life, then to the testator's four brothers and sisters, "or such of them as should be then living," equally, &c.; and in case any of them should be then dead, the deceased child's share to his or her children, to be paid at the time before mentioned. The brothers and sisters all died in the lifetime of *H. S.*, one of them (*A. B.*) having had no children. It was held that the representatives of *A. B.* were entitled to his share, and that all the children took, whether living at the death of *H. S.* or not. In *Lanphier* v. *Buck* (2), Vice-Chancellor *Kindersley* delivered a very elaborate judgment; and, referring to a decision of his own in *Humfrey* v. *Humfrey* (3), pronounced a year or two before, under pressure of authority, but against his view as to principle, he reverted to his earlier opinion, and declared that where the gift is original, it is not necessary that the child, in order to take, should survive the parent, though it might be so if the gift was by substitution alone. The gift here is original, and that distinction applies. The gift to the parents is limited by reference to the death of the tenant for life, that to the children is not so; and being original, it vested in them at once. In *Merricks' Trusts* (4), this decision of Vice-Chancellor *Kindersley* was deliberately adopted by Vice-Chancellor *Wood*. *Sanders' Trusts* (5) is to the same effect. There are two authorities, before Vice-Chancellor *Leach*, which proceeded on the same rule: *Thornhill* v. *Thornhill* (6), and *Sturgess* v. *Pearson* (7). In the former, there was a gift to the widow for life, and after her death the estate was to be sold, and the produce divided among the testator's nephews and nieces; the children of such of them as should be then dead to stand in the place of their father or mother deceased. It was held that the children of such of them as had died after the testator, and before his widow, were entitled. In *Sturgess* v. *Pearson*,

(1) 13 Beav. 60.
(2) 2 Dr. & Sm. 484; 11 Jur. N.S. 857
(3) Ibid. 49; 8 Jur. N.S. 500
(4) Law Rep. 1 Eq. 551; 12 Jur. N.S. 245.
(5) Ibid. 675; 12 Jur. N.S. 351.
(6) 4 Madd. 377.
(7) 4 Madd. 411.

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(which was expressly adopted by Vice-Chancellor *Wood* in *Sanders' Trusts*), the bequest was to *A. T.* for life, then to be equally divided amongst her three children, or such of them as shall be living at her death. All the children died in her lifetime; but they were held to take vested interests, transmissible to their representatives. The greatest number of authorities is, therefore, in favour of the Appellant; and it is submitted that these authorities are most in accordance with the true principles of construction.

The *Attorney-General* (Sir *R. Palmer*), and Mr. *Selwyn*, Q.C. (Mr. *Shebbeare* was with them), for the Respondent:—

It is admitted that the authorities are conflicting: the words of the will must therefore be taken, and to them must be applied the strict principle of construction. Here the will gives a life interest to the widow, and then says, "and after her death to distribute and divide the whole estate." There must be a period for distribution, and that introduces the rule, that where there is a gift to a class, the period of distribution settles the class: *Leake* v. *Robinson* (1). *Barker* v. *Barker* (2), was altogether a case of vested interests; the words of the will there gave to the children, on the death of the parent, the share which the parent would have taken if living. There are no such words here. *Thornhill* v. *Thornhill*, and *Sturgess* v. *Pearson*, do not apply here, for a similar reason. The words here, that if any of them "should then be dead, leaving issue," point to a particular period of time; and that is, in this will, the time of distribution. The word "then," in the phrase "should then be dead leaving issue," must refer to the time mentioned in the preceding sentence, and that is the time of the wife's decease, and the issue so spoken of must be alive at that time, or cannot take any interest. The scheme of the will cannot be, on the force of an argument derived from convenience, divided into parts, and one part be made applicable to those who became interested at the death of their parents, and the other to those who became interested only at the period of distribution. All the cases agree in this, that when the gift is originally to the issue, though they were dead before the death of the tenant for life, the interest would

(1) 2 Mer. 364, 383. (2) 5 De G. & Sm. 753, 17 Jur. 125.

be vested; but that does not affect or include those who are really to take only by way of substitution on the death of their parents, and who die before their parents. The case of *Sanders' Trusts* merely followed upon that of *Merricks' Trusts* (1), and was but a repetition of a former decision by the same learned Judge. Here is no vested interest, but only a substitution.

[LORD WESTBURY:—Substitution really is where the parent takes something; here he was dead before the tenant for life, and so he took nothing at all.]

The case of *Crause* v. *Cooper* (2) occurred some time before that of *Wildman's Trusts* (3), and, when properly considered, they conflict with each other. In *Crause* v. *Cooper* the bequest was to trustees for a niece for life, and after her death to transfer the principal to and among her children living at her decease, "or the children of any child who may be then dead." A grandchild who pre-deceased his parent was held to be excluded from any share in the fund. In *Wildman's Trusts*, on the other hand, there was a bequest to testator's daughter *A.*, for life, and in case of her decease without issue, her share was to go among the testator's other children, and among the children of such of them as had previously died. That was an original gift to both, and the interest of both vested at the same time.

Many of the cases cited on the other side have no application here. They were cases of vested interests, and the only question in them was, whether these interests had been devested or not. *Masters* v. *Scales* (4) is an example of that sort; the words there vested the interest and merely postponed the payment. *Eyre* v. *Marsden* (5) is another, and there the period of distribution was that which decided the question. In *Bennett* v. *Merriman* (6), which was much like the present case, it was held that the issue of the children took by substitution, and that to entitle them they must survive the tenant for life. In the case of *Corrie's Trusts* (7), a substituted bequest was held to be subject to the

(1) Law Rep. 1 Eq. 551.
(2) 1 J. & H. 207.
(3) Ibid. 299.
(4) 13 Beav. 60.
(5) 2 Keen, 564, 575.
(6) 6 Beav. 360.
(7) 32 Beav. 426, 430.

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same contingency as the original bequest; and the Master of the Rolls said, "I have always considered the rule to be, that where, by a clause in a will, children are substituted for their parents, the same contingency which applies to the parents is also applicable to the children, and that it is necessary the children should survive the period indicated, to enable them to take. Later authorities seem to contradict that view of the case, but it is scarcely possible to say there are more authorities one way than the other;" and he said this with a full recollection of the two rules, that the vesting is to take place, and that the class is to be ascertained, as speedily as possible. In *Turner* v. *Sargent* (1) the testator gave real and personal property to his daughter to be settled on her for life, "to the exclusion of her present or any future husband, and be secured for the benefit of her children equally after her death, so that the issue of any such child dying in her lifetime might take his or her parent's share." The Master of the Rolls directed the property to be settled on her for life, and after her decease upon trust for such of her children as should survive her, and for the issue, living at her death, of such of her children as should not survive her. In *Smith* v. *Palmer* (2), which itself does not bear on the present case, Vice-Chancellor *Wigram* made some observations which are very applicable here. He said that it had been argued that, in the case of a gift to a class, "the Court will read the gift to the class, where the gift is substitutionary, as a contingent gift to such of the class as are living at the period of distribution," which period is here, as there, the death of the testator's widow. Apply the principle there clearly stated, and the result must be adverse to this Appellant.

In *Lyon* v. *Coward* there was not a substitutional gift to a class, but an original gift to such of the children of the testator's sisters as might be living at the decease of his wife; and *Barker* v. *Barker* was decided without reference by the Vice-Chancellor to any former authority, except that of *Masters* v. *Scales*, where the decision really depended on the words of the particular will; and the same observation is applicable to the case of *Wildman's Trusts* (3).

The decision of Vice-Chancellor *Kindersley* in *Humfrey* v. *Hum-*

(1) 17 Beav. 515. (2) 7 Hare 225.
(3) 1 J. & H. 299, 7 Jur. N.S. 121

frey (1) does not appear, from the report, to have been given on any pressure of the authorities, for none seems to have been cited. It was pronounced on a full consideration of the case, and may fairly be set off against the other decision of the same learned Vice-Chancellor in *Lanphier* v. *Buck* (2).

The case of *Merricks' Trusts* (3) ought not to be cited as an authority, for it avowedly declared the law to be unsettled, and was but a re-assertion of the previous opinion of the learned Vice-Chancellor.

The gift here is one by substitution, under the rule stated in *Pearson* v. *Stephens* (4), and, being so, the persons taking by substitution must, according to all the authorities, survive the tenant for life in order to make out their claim.

Mr. *Baggallay* replied.

The LORD CHANCELLOR (Lord *Cranworth*) had a strong opinion on the case, but as there had been conflicting authorities their Lordships would take time to consider the question.

June 1. THE LORD CHANCELLOR (Lord *Cranworth*):—

My Lords, this appeal is from a decision of the Master of the Rolls, made in a suit for the distribution of the residuary estate of a testator of the name of *Jennings*, who by his will gave "the rest, residue, and remainder of my said estate and effects in trust to pay over the annual proceeds thereof to my said dear wife, *Susan Jennings*, for and during the term of her natural life, and from and immediately after her decease to distribute and divide the whole of my said residuary estate and effects unto and amongst such of my said four nephews and two nieces, namely, *Joseph Crew Jennings*, *Thomas Robert Jennings*, *Edwin Jennings Martin*, *Arthur Martin*, *Elizabeth Holgate*, and *Ellen Jennings*, as shall be living at the time of her decease, in equal shares and proportions as tenants in common, and not as joint tenants; but if any or either of them should then be dead, leaving issue, then it is my will and meaning that such issue shall be entitled to their father's or mother's share, but in equal proportions."

(1) 2 Dr. & Sm. 49; 11 Jur. N.S. 500
(2) Ibid. 484; 11 Jur. N.S. 897
(3) Law Rep. 1 Eq. 551; 12 Jur. N.S. 245.
(4) 2 Dow. & Cl. 328; 5 Bl. (N.S.) 203.

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What happened was this, the wife survived her husband, and at the death of the testator all these four nephews and nieces were living. Two of the nephews died in the lifetime of the tenant for life without leaving issue. Another of them, *Edwin Jennings Martin*, during the lifetime of the widow, but leaving a daughter, *Augusta Mary Martin*, who afterwards died an infant, also in the lifetime of the testator's widow. So that, at the death of the widow, which happened soon after the death of *Augusta Mary Martin*, only one nephew and two nieces were living.

What the Master of the Rolls has decided is, that in these circumstances, the property became divisible into three parts. On the part, however, of those who represent *Augusta Mary Martin*, it is contended that that was a wrong decision, that the property ought to be divided into four parts, and that the representative of *Augusta Mary Martin* was entitled to one of those four parts. That depends on the question whether *Augusta Mary Martin*, at the death of her father, did or did not take a vested interest in the share which her father, if he had survived the tenant for life, would have taken.

There has been a conflict of decisions on this question, and I do not hesitate to say that in the course of the argument, and even since, my mind has from time to time considerably fluctuated. I have, however, eventually come to the conclusion that the Appellant is right. The grounds on which I doubted (it is perhaps unnecessary for me to state, but I will state them) were these; I put the question in this shape:—Suppose I give to *A.* for life, and at his death to *B.*, *C.*, and *D.*; but if any of them, *B.*, *C.*, or *D.*, shall be dead, then his share to go to his children. I should say that "issue," in the present case, necessarily means *children*, because the "issue" are to take the father's or mother's share; therefore, by "issue," *child* or children must be meant. The words used by the testator then necessarily mean, if any of my nephews and nieces shall be dead, leaving a child or children; for if he or she had not left a child or children, the gift to child or children would be inoperative. If, therefore, we construe the words "leaving issue," that is, leaving a child or children, to mean leaving a child or children at his own death, we make the words practically inoperative; the sense would be the same if they were omitted.

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But it is a rule of construction that we should, if possible, give effect to every word; and this we do if we connect the words "leaving issue," with the prior word "then." These considerations at one time led me to think that the construction put in this case by the Master of the Rolls was correct.

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But the rule of construction to which I have referred is by no means an inflexible one; and it is here encountered by another rule—namely, that we are never to construe a gift as contingent unless the context requires us to do so; and it is very difficult to say that in this case there is any such necessity. When we speak of a person having died leaving a child or children, we mean leaving a child or children at his death. If, therefore, the language here had been, if any of them should, at the death of my wife, have died leaving issue, it would have meant if any should at or before that time have died leaving issue at his own death, and if that be so, it is hard to say that any difference is to arise from the circumstance that the words are not "shall then have died leaving issue," but "shall then be dead leaving issue." Such a distinction would savour of technical subtlety barely intelligible to ordinary minds.

I must add that the question is not new. It has arisen very frequently of late years. In favour of the construction adopted by the Master of the Rolls, there is the authority of Lord *Langdale*, in *Bennett* v. *Merriman* (1), and of Lord Justice *Knight Bruce*, in *MacGregor* v. *MacGregor* (2), and in *Kirkman's Trusts* (3); but in favour of the contrary construction—that which gives to the child a vested interest at its birth—there is the authority of the late Vice-Chancellor *Shadwell*, in *Lyon* v. *Coward* (4), of the late Vice-Chancellor *Parker*, in *Barker* v. *Barker* (5), of Vice-Chancellor *Stuart*, and of Lord Justice *Turner*. In these circumstances, and knowing that the view taken by your Lordships is in accordance with these latter authorities, the force of which I feel to be very great, I think that this is the construction which your Lordships ought to adopt, and I shall, therefore, move your Lordships to declare that *Augusta Mary Martin* took a vested interest in

(1) 6 Beav. 360.
(2) 2 Coll. 192.
(3) 3 De G. & J. 558.
(4) 15 Sim 287.
(5) 5 De G. & S. 753; 17 Jur 125.

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one-fourth of the residuary estate of the testator, and with that declaration to remit the case to the Court of Chancery, to be dealt with as may be just. The Master of the Rolls, though deciding against the Appellant, yet felt that the case was one of so great nicety as to call for the decision of this House. I think, therefore, that it is a case in which the costs of the appeal ought to be borne by the testator's estate.

LORD CHELMSFORD:—

My Lords, the conflict of decisions on bequests to legatees answering certain descriptions, or upon certain contingencies, and in case of their death, to their children after them, where both they and their children die before the period of distribution or enjoyment, "renders it most desirable (as the Master of the Rolls said in this case) that the question should be settled by some authoritative decision." The opportunity is now afforded to your Lordships finally to determine which of the opposite constructions, put by learned Judges on various occasions, upon clauses of this description, ought to be adopted.

In considering this question it will be proper to adhere as closely as possible to the words of the will, and from them to gather the intention. We are not at liberty to conjecture what the testator would have said if a particular state of things had been presented to his mind, which, it is apparent from the language he has used, had not occurred to him, and for which, therefore, it cannot be supposed that he intended to make any provision.

The question to be decided is, whether the contingency annexed to the gift to the nephews and nieces of the testator applies also to their children, from the words "if any or either of them should then be dead leaving issue, then such issue shall be entitled to the the father's or mother's share." The word "issue" must here be read "children," and this gift to the children is not a substitutional, but an original gift. It is not to nephews and nieces absolutely, and in the event of their dying in the lifetime of the tenant for life, then to their children; but to such of the nephews and nieces as shall be living at the death of the tenant for life, and to the children of such of them as shall then be dead, leaving children. The shares which the children are to take could never have vested

in their parents; because it is only in the event of the parents not having become entitled to them that they are given to the children. This distinction between original and substitutional gifts may furnish some aid to the construction of the will. Where a gift is substitutional, it may much more easily be presumed that a contingency on which the original gift depends is intended to be applied to the gift which comes in its place, than in the case of two original and independent gifts.

The construction contended for on the part of the Respondents requires that to the words "if any or either of them should then be dead leaving issue," there should be added the words "then living." Now what ground is there for importing these words into the will. The Master of the Rolls says, "The testator did not intend by these expressions to substitute a dead person for a dead person." But, with submission to his Lordship, this is not the correct mode of dealing with the question. It does not appear that the testator had at all contemplated the event of the death of a child surviving a nephew or niece, and dying in the lifetime of the tenant for life; and, therefore, he made no provision for it. And we must not strain his language to make it meet a conjectural intention. The proper meaning of the words "should then be dead leaving issue" is "should then have died leaving issue." And the words "leaving issue," must necessarily apply to the period of the death of the nephews or nieces, and not to the death of the tenant for life; because it forms part of the compound events connected with the nephews and nieces, upon the happening of which the gift to the children is to take effect. Everything beyond the words used, which they do not necessarily import, is conjecture, and not construction.

We are not at liberty to speculate upon whether it was likely or unlikely that the testator would apply the same condition to the gift to the nephews and nieces and to their children. But it may be observed that the application of the condition to the gift to the children might, upon a given event, have led to consequences which it can hardly be imagined the testator could have intended. It is agreed that the words "leaving issue" mean "leaving children." Now *Augusta Mary Martin* might have died, not only in the lifetime of the tenant for life, but also before her

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father, leaving children, and, according to the construction contended for by the Respondents, the children could have taken no benefit under the will.

Upon these short grounds I think that the Decree appealed from ought to be reversed.

LORD WESTBURY:—

My Lords, when this case is considered by itself, free from the embarrassment arising from conflicting decisions, the question is not one of much difficulty.

The testator bequeaths his residuary estate to his wife for life and then to such of his nephews and nieces as should be living at the death of the tenant for life. This form of gift is contingent, and vests in such only of the nephews and nieces as shall be living when the tenant for life dies. To this bequest the testator adds another in favour of the issue left by any nephew or niece who may predecease the tenant for life. This last is an independent bequest. The words are, "if any or either of them" (that is of my nephews and nieces) "should then" (that is at the death of the tenant for life) "be dead, leaving issue, such issue shall be entitled to their father's or mother's share" (that is, to the share which the father or mother if living would have taken). This form of bequest is very different from the other, for, according to its plain effect and meaning, unless that meaning be altered by the implication of additional words, the issue living at the death of a nephew or niece, who may predecease the tenant for life, take an immediate vested interest in that share which would have been taken by the parent, if he or she had been living at the time of distribution. The interest of the issue is vested and immediate, although the amount of the share is uncertain until the death of the tenant for life. To support the Decree and the Respondent's construction, it would be necessary to alter the whole form of the testator's bequest, and to substitute other words for those he has used.

The Respondent contends that the bequest must be construed as if the words had been, "The issue left by any nephew or niece predeceasing the tenant for life, *if such issue be living at the death of the tenant for life,* shall be entitled to the father's or mother's

share." This construction completely alters the form and effect of the bequest made by the testator, according to the plain meaning of the words he has written. The implication thus made is not warranted by the form of the gift, which is not elliptical, nor referential, nor substitutional. And the implication is not necessary for the purpose of avoiding any absurd or contradictory consequences. It is by no means irrational to suppose that the testator intended to make the interest of the orphan issue vested and immediate, although he had made the interest of the parent contingent on surviving the tenant for life.

A Judge is not justified in departing from the plain meaning of words, which admit of a rational interpretation, for the purpose of giving effect to an assumed intention, which appears to him to be more rational, or more consistent with the rest of the will.

By the Court below, an intention to make the distinct gift to the issue contingent, has been assumed from the fact of the gift to the parent being contingent. But that fact does not warrant any such inference so as to control the plain meaning of the words.

On the settled rules of construction I think the judgment of the Master of the Rolls is erroneous. With respect to the numerous decisions, the greater weight of authority is in favour of the reversal of this decree. I concur, therefore, in the form of order which has been suggested by my noble and learned friend on the woolsack.

Order appealed from reversed; cause remitted, with a declaration, and a farther declaration as to costs being paid out of testator's estate.

Lords' Journals, June 1, 1866.

Solicitors for the Appellant: *Lovell & Co.*
Solicitors for the Respondent: *Reece & Holgate.*

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THE MOST REVEREND PAUL CULLEN . . . APPELLANT;

AND

THE ATTORNEY-GENERAL FOR IRELAND RESPONDENT.

Legacy—Charity.

The Stamp Acts applicable to *Ireland* exempt from duty any legacy given for a purpose merely charitable. They define a legacy to be "any gift, by any will or testamentary instrument of any deceased person, which, by virtue of any such will, shall have effect," &c. *B. F.*, by will, gave the residue of her estate, of what nature soever, to two persons, *D.* and *M.* On the day on which she made her will she wrote letters to them explaining to them that she intended the money bequeathed to be applied to a certain charitable purpose, and she relied on their honour and integrity to fulfil her wishes. In her lifetime they accepted the trust thus imposed on them by these letters:—

Held, that the will itself not shewing a charitable purpose, but appearing on the face of it to create a bequest in favour of two individuals, the legacy did not come within the terms of the exemption, but was liable to duty.

56 Geo. 3, c. 56; 5 & 6 Vict. c. 82; 8 & 9 Vict. c. 76.

THIS was an appeal against a decision of the Court of Exchequer in *Ireland* (14 Ir. Com. Law Rep. 137).

Miss *Bridget Fitzgerald*, on the 10th of February, 1829, made her will, by which she appointed *Peter Locke* and the Reverend *Patrick Doyle* her executors, and, after certain specific bequests, gave the residue of her property, of what nature soever, to the said Reverend *Patrick Doyle* and the Most Reverend *Daniel Murray*, and the survivor of them, requesting that all the intentions in that her last will and testament expressed, might be fulfilled and carried into execution immediately. She afterwards made different codicils, not necessary to be referred to, except one (dated 7th of October, 1839), in which, to remove any doubt as to her intention in relation to the disposal of her real and personal estate, she declared that the same should go to the said *Patrick Doyle* and the Most Reverend *Daniel Murray* named in the will, according to the direction therein, and that it was not intended that the same, or any part thereof, should go to any other person.

On the same 10th of February, 1829, when she made her will,

she wrote three letters—one directed to Dr. *Murray*, and two to the Reverend *Patrick Doyle*. In the first of these letters she said: "Your Grace will be aware, by my leaving the residue of my property to you and the Reverend *Patrick Doyle*, I do so merely as a trust, that the property left to you and him may be disposed of in the manner and for the purposes I shall direct; thinking it better to do so, than mentioning them particularly in my will." She then expressed her wish that, after the payment of debts, and money for masses for the repose of her soul, the remainder should be laid out towards the foundation of a convent for the education of female children (as to which she gave very full details), and, having explained her wishes, concluded by saying: "In regard to making him and you my residuary legatees, I rest satisfied that I have reposed confidence in two persons of strict honour and integrity." The letters to the Reverend *Patrick Doyle* were of the same import. Dr. *Murray* and the Reverend *Patrick Doyle*, in the lifetime of the testatrix, accepted the trusts thus imposed on them. She died on the 5th of May, 1850, and the Reverend *Patrick Doyle* took out probate of the will. Dr. *Murray* died in February, 1852; the Reverend *Patrick Doyle* died in December, 1852, having by his will appointed the present Appellant his executor. The Appellant took possession of the estate, treating this fund as one held for the charitable purpose disclosed in the letters of *Bridget Fitzgerald*. Application had been made for the payment of duty on the property bequeathed, but exemption was claimed, under the Irish Revenue Acts, as for property bequeathed for charitable purposes (1). An information was filed, in April, 1862, claiming the duty. The Appellant filed his

(1) By the 56 Geo. 3, c. 56, Schedule, Part 3, one of the exemptions is in respect of "legacies given for the education or maintenance of poor children in *Ireland*, or to be applied in support of any public charitable institution in *Ireland*, or for any purpose merely charitable."

By the 5 & 6 Vict. c. 82, s. 38: "Every gift, by any will or testamentary instrument of any deceased person, which, in virtue of any such will or testamentary instrument, shall have effect or be satisfied out of the personal estate of such person so dying," &c., "shall be deemed and taken to be a legacy, within the meaning of this Act. . . . Provided, that nothing herein contained shall extend, or be construed to extend, to charge with duty in *Ireland* any legacy given for the education or maintenance of poor children in *Ireland*, or to be applied in support of any charitable

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answer in July, 1863, and thereby submitted, as matter of law, that the letters of Miss *Bridget Fitzgerald* constituted a trust, which was accepted by the trustees, and was such as a Court of Equity would enforce; and that this legacy being such a bequest for charitable purposes, no duty was payable in respect thereof. The Court of Exchequer, on the 29th of June, 1863, gave judgment for the Crown; accounts were directed, and the Master made his report; and a decree confirming the same was made on the 26th of July, 1864.

This was an appeal against these decrees.

Mr. *Rolt*, Q.C., and Mr. *W. H. G. Bagshawe*, for the Appellant:—

By the Revenue Acts affecting *Ireland*, a person for whose benefit a legacy is given is liable to duty, but when that person is in fact a charity, there is no liability at all. The letters here created a trust for a charity, and the bequest was one merely for charitable purposes.

[LORD WESTBURY:—If these documents creating the charity were to have a *post mortem* effect, why were they not proved in that character?]

They could not be; they were not attested as the law requires, but in Equity they constitute a trust, and that trust has been accepted. This is a bequest of personal estate. Where there is such a bequest to two persons, who, on the face of the will, appear to be benefited, though no trust is therein declared, if there are papers executed at the same time creating a trust, and the two persons accept that trust as to the fund bequeathed, the exemption arises by virtue of the statute. Here is a valid trust for the purposes of

institution in *Ireland*, or for any purpose merely charitable."

The 8 & 9 Vict. c. 76, s. 4, recites the 55 Geo. 3, c. 184, and the 5 & 6 Vict. c. 82, and declares "that every gift, by any will or testamentary instrument, which, by virtue of such will or testamentary instrument, is or shall be payable," or shall have effect or be satisfied out of "the personal estate or effects of the person making the same," or "shall be charged or rendered a burden upon the real or heritable estate of such person," or out of any moneys to arise by sale of the same, "shall be deemed a legacy within the meaning of all the several Acts granting duties, &c.," in *Great Britain* and *Ireland*.

mere charity—a trust which equity will perform, if the trust is itself legal; if not legal, the fund would go in due course of law. The acceptance of the trust renders it enforceable in equity against the trustees, though it might not have been so had the trustees known nothing of it till after the testatrix's death: *Wallgrave* v. *Tebbs* (1). But where the trust is known and accepted by them, and the purpose of it is legal, it will be enforced: *Lewin* on Trusts (2). In *Adlington* v. *Cann* (3), Lord *Hardwicke* only declined to execute a trust of this kind because he was not satisfied as to the evidence of the testator's intention. Here there can be no doubt on that point. In *Podmore* v. *Gunning* (4), a testator gave his estate to his wife absolutely, having confidence that she would act up to "those views which I have communicated to her in the ultimate disposal of my property after her decease." After the wife's death, a bill was filed by two natural children of the testator against his next of kin and her heir and administrator, alleging that the testator, at the time of making his will, desired his wife to give the whole of his property after her death to them, and that she promised and undertook so to do. Vice-Chancellor *Shadwell* held that if the Plaintiffs had proved that allegation, a trust would have been created, as to the whole of the property, in their favour. If the testator's intention is clear, then, being a legal trust for valid purposes, it will be enforced, most especially if it has been actually accepted by the person entrusted to perform it: *Drakeford* v. *Wilks* (5).

Assuming, then, that this is an established trust, legal in itself, and capable of being enforced in equity, it is submitted that the bequest is, under the provision of the Acts relating to revenue in *Ireland*, exempted from duty. There is no doubt here that the purpose of the bequest is, within the words of the statute, "merely charitable." The statute does not say for charitable purposes as given by the will, but, for charitable purposes. The purposes here are such; and the legacy being given by a person having power to give it, is, within the words of the statute, a legacy, and so would be subject to duty; but, being given for purposes merely chari-

(1) 2 K. & J. 313. 2 Jur. N.S. 83
(2) 4th ed. p. 50.
(3) 3 Atk. 141.
(4) 7 Sim. 644.
(5) 3 Atk. 539.

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table, it is, by force of the proviso in the statute, exempt from duty. Here is a testamentary bounty, not created, perhaps, exclusively by the will, but partly by something engrafted on the will.

The *Attorney-General for Ireland,* and Mr. Serjeant *Barry,* for the Respondent:—

The real question here is, whether, under the words of the statutes, the title of the legatee must not, in order to found the exemption, be derived through the will, and through the will only. The 38th section of the 5 & 6 Vict. c. 82, directs executors, on paying or retaining legacies, to deduct the duty. From whom was it to be deducted here? From the Reverend *Patrick Doyle* and Dr. *Murray,* for they alone, on the face of the will, were entitled to receive the money. Then again, the 8 & 9 Vict. c. 76, s. 4, recites that doubts had been entertained whether certain gifts by will or testamentary instrument are legacies liable to the duties imposed by that and former Acts; and then it enacts that every such gift, whatever may be the form in which it is given, if it is a gift which by virtue of the will shall have effect out of the personal estate of the testator, shall be deemed a legacy. It is only a legacy to a charity, or for a charitable purpose, which is exempted from duty. The Legislature has in that section defined what shall be deemed a legacy—it must be something given by will or testamentary instrument. As such it would be liable to duty. To come within the exception, it must be a legacy given by the will or the testamentary instrument for charitable purposes. Here is a legacy given by a will; it is given to two persons specially named. On the face of the will, it is not given for charitable purposes, nor is there anything on the face of the will to shew that there was to be any application of the money extrinsic to the provisions of the will. It is, therefore, an ordinary legacy, liable to duty. Suppose, on the face of the will, the gift appeared to be for charitable purposes, but by a private arrangement it really was given to these private persons; the Attorney-General would of course intervene, but what would happen? The will, and nothing else, would decide how the legacy was given, and the claim for duty would be defeated. The will is the only test of the character of the legacy,

and the only proof of the person to whom, or the object for which, it is given.

Mr. *Bagshawe* replied.

June 8. THE LORD CHANCELLOR (Lord *Cranworth*):—

My Lords, this is a question which lies within the narrowest compass. This lady, *Bridget Fitzgerald*, by her will, and several codicils, gave the residue of her property to two gentlemen, both of whom have died, and who are now represented by the Appellant, the Most Reverend Archbishop *Cullen*. By her will, she gave the property to these two persons *simpliciter;* but then it must be taken as an admitted fact that she gave it to them upon their having, in her lifetime, validly undertaken that they would hold it upon certain charitable trusts. Now, in that part of the *Stamp Act* relating to *Ireland* which refers to testamentary instruments and the duty payable upon wills or administrations, there is an exemption, which does not exist in *England*—namely, in favour of "any legacy given for the education or maintenance of poor children in *Ireland*, or to be applied in support of any charitable institution in *Ireland*, or for any purpose merely charitable." There is no doubt that, if you are to couple that which was undertaken by these gentlemen with the legacy, this gift comes within the exemption; for it is admitted on all hands that it was a gift which, coupling the will with the undertaking of the legatees, amounted to a gift for purposes merely charitable. The question is, whether, inasmuch as the gift did not, on the face of it, purport to be a gift merely charitable, but was apparently a gift to the legatees themselves, for their own benefit, you can, for the purposes of legacy duty, couple that legacy with the fact that the legatees had undertaken to hold it for merely charitable purposes.

I think it extremely important that a rule should be laid down on this subject; and undoubtedly the more convenient rule is that which has been adopted by the Court below, because it is a rule which imposes no difficulty upon executors (administrators are out of the question in this case) when they come to pay the duty, in knowing what the amount of duty is to be. I cannot disguise from myself that the rule so laid down is one which may enable

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parties (unless the *Succession Duty Act* alters it, and I am not assured how that may be) always to evade, or rather to avoid, the payment of any legacy duty; because, if the testator is a married man, he may leave the whole of his property to his wife, taking an undertaking from her, which does not form part of his will, that she, at his death, will dispose of the property in such and such a way. He can probably trust her; and whether he can trust her or not, if he takes measures to secure that it shall be forthcoming at his death, she will be bound to execute the trust, and therefore no duty will be payable, because, *ex facie* of the will, it is all given to her. I observe that one of the learned Judges, Baron *Fitzgerald*, rather alludes to a case of that sort, and says he doubts whether, in such a case, the Court might not find means of compelling the party beneficially interested to pay the full duty (a) I own I cannot follow that. The rule, therefore, as laid down, is open to the objection that it may, according to the present state of the law, lead to parties escaping from the payment of legacy duty altogether, or very nearly so, by a testator giving the property to his wife (in which case there is no duty payable) or to a child (in which case the duty is only 1 per cent.), although it may really be intended to be given to strangers (the duty upon such a bequest being 10 per cent. in *England*, and 5 or 6 per cent. in *Ireland*. That duty of 10 per cent., or of 5 per cent., as the case may be, would therefore be avoided, and a duty of 1 per cent. only, or nothing at all, would be paid, according as the property was given on the face of the will to a child or a wife. No doubt, there is a considerable difficulty in that view of the question. Perhaps, the only answer to it is, that the statute has not contemplated such a case, and that is the real answer to the question which was put two or three times at the bar in the course of the argument—What is the meaning of the words, "legacy given," in the proviso? Do they mean given by will, or do they mean so given that, coupling the gift to the legatee with the obligation which the law imposes upon it, the two together are to be taken as the legacy?

I own that I have had considerable doubts upon the subject, but the rule laid down by the Court below is certainly the more convenient of the two, and as I know that both my noble and

(a) See 12 Jur. N.S. 533 a.

learned friends who have heard this case consider the decision to be perfectly right, I do not feel it necessary to state any farther the doubts which have arisen in my own mind. Under these circumstances, I think the decision which has been come to by the Court below in the case of this will is right. I have, therefore, to move your Lordships that the judgment of the Court below be affirmed.

LORD CHELMSFORD :—

My Lords, the question to be decided is, whether the gift of the residue, by the will of *Bridget Fitzgerald* to the Rev. Dr. *Doyle* and Archbishop *Murray*, is exempt from legacy duty by reason of its being made, by certain letters contemporaneous with the will, applicable to trusts for charitable purposes, and which trusts were accepted by the legatees.

Confining myself entirely to the words of the Acts of Parliament, I have little difficulty in coming to a conclusion in favour of the Crown. The definition of a legacy given by the 38th section of 5 & 6 Vict. c. 82, and the 4th section of the 8 & 9 Vict. c. 76, is a "gift by any will or testamentary instrument of any deceased person, which, by virtue of any such will or testamentary instrument, shall have effect or be satisfied out of the personal estate." It is clear upon the definition that the gift can be a legacy only to the person named in the will, because he alone takes by virtue of the will.

Bearing this in mind, in turning to the exemption in the 38th section of the 5 & 6 Vict. c. 82, on which the question turns, the proper construction appears to me to be obvious. That exemption is: "That nothing herein contained shall extend or be construed to extend to charge with duty in *Ireland* any legacy given for the education and maintenance of poor children in *Ireland*, or to be applied in support of any charitable institution in *Ireland*, or for any purpose merely charitable." What is the meaning of the words "any legacy?" It is a gift which, by virtue of the will, is to have effect out of the personal estate. Now, the residue in this case is not by virtue of the will given for charitable purposes, but by virtue of the trust imposed by the letters contemporaneous with the will. The duty is chargeable upon a legacy

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given by will. The exemption applies to a legacy *given* or to be applied for charitable purposes. From the comparison of the definition of a legacy with the terms of the exemption which I have made, I can come to no other conclusion than that the legacy for charitable purposes must be expressly so given by the will itself to exempt it from duty.

Upon these grounds, therefore, I think the judgment of the Court below is perfectly right, and that it ought to be affirmed.

LORD WESTBURY:—

My Lords, having regard to the argument upon this case, I think it very material to point out that where there is a secret trust, or where there is a right created by a personal confidence reposed by a testator in any individual, the breach of which confidence would amount to a fraud, the title of the party claiming under the secret trust, or claiming by virtue of that personal confidence, is a title *dehors* the will, and which cannot be correctly termed testamentary.

The question then arises, what is the meaning of the words in the statute that has been referred to? The object of that portion of the statute is to charge testamentary gifts with certain rates of duty, according to the existence or the absence of relationship between the testator and the donee. Now, a gift by will, or a legacy by will, involves, of necessity, certain things—not only a description of the subject given, but also a nomination or description of the individual to take, or the purpose which is to be answered by the legacy. If there be, therefore, a gift to *A.*, and if there be a collateral matter which renders *A.* bound to apply the subject of the gift to some purpose not to be found within the expression of the gift, and the obligation arises not on the face of the will, or by virtue of the will, but arises from something *aliunde*, it follows of necessity that the person, or the purpose to be benefited, cannot, with any correctness of language, be denominated a legatee, or a testamentary purpose.

When, therefore, we are adverting, as we have here to advert, to the effect of the exemption out of legacies charged with duties, we find the words of the exemption to be "a legacy for a purpose merely charitable." If that be so, does it not, of necessity, follow

that the "purpose merely charitable," being in reality the real object of the legacy, must, by every rule to be derived from the nature of the subject, and from the language of the statute, be a purpose expressed on the face of the will? The exemption is intended to be applied only to testamentary bounty, and testamentary bounty to charity; but you cannot say that this is a bounty to a charity, when the charity has no place, and is not to be found either in anything that is expressed in the will, or in anything that is so referred to in the will as by that reference to be made part of the will. The words unquestionably would not include a person taking by anything other than a testamentary title; otherwise there would be no limit. A legatee taking a sum of money by virtue of a will, might declare a trust a day or a month after the death of the testator, and the whole of the reasoning that we have heard to-day would be equally applicable to a charitable purpose expressed in that trust, and it might be held equally to exempt the property first given by will to a particular person, and afterwards dedicated to charitable purposes, from being liable to duty.

I think the conclusion arrived at by the Courts below is quite a correct conclusion. In matters of this kind relating to the interpretation of fiscal acts, we are not at all to have regard to what the effect of the decision may be with reference to the fiscal duties. Our duty is limited only to this: to inquire whether the tax imposed does attach, or whether, when the tax is imposed with an exemption, the particular case comes within the fair, proper, and legal meaning of that exemption. Whatever may be the result upon other fiscal duties is not properly a subject of judicial reference upon the occasion of determining a question of this kind.

I, therefore, undoubtedly concur in the opinion of my noble and learned friend on the woolsack, that the judgment of the Court below ought to be affirmed.

Decrees affirmed, and Appeal dismissed with costs.

Lords' Journals, 8th June, 1866.

Solicitors for the Appellant: *Eyre & Lawson.*

Solicitor for the Respondent: *The Solicitor for the Inland Revenue.*

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June 14, 15, 18, 19, 21.

HENRY WILLIAMS AND OTHERS . . . . . APPELLANTS;

AND

JAMES BAYLEY . . . . . RESPONDENT.

Forgery—Stifling a prosecution—Undue pressure—Agreement.

A son carried to bankers of whom he, as well as his father, was a customer, certain promissory notes with his father's name upon them as indorser. These indorsements were forgeries. On one occasion the father's attention was called to the fact that a promissory note of his son with his (the father's) name on it, was lying at the bankers dishonoured. He seemed to have communicated the fact to the son, who immediately redeemed it; but there was no direct evidence to shew whether the father did or did not really understand the nature of the transaction. The fact of the forgery was afterwards discovered; the son did not deny it; the bankers insisted (though without any direct threat of a prosecution) on a settlement, to which the father was to be a party; he consented, and executed an agreement to make an equitable mortgage of his property. The notes, with the forged indorsements, were then delivered up to him:—

Held, that the agreement was invalid.

A father appealed to, under such circumstances, to take upon himself a civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with a moral certainty of a conviction, even though that is not put forward by any party as the motive for the agreement, is not a free and voluntary agent, and the agreement he makes under such circumstances is not enforceable in equity.

THIS was an appeal against a decision of Vice-Chancellor *Stuart*, by which certain agreements given by the Respondent to the Appellants were declared void, and were ordered to be delivered up.

The Appellants were bankers at *Wednesbury*, in *Staffordshire*. The Respondent carried on the business of a coalmaster near that place, and he also occupied a large farm at *Knowle*, in *Warwickshire*. One of his sons, *William Bayley*, had been for some years in business as a dealer in coal and coke at *West Bromwich*, and at *Birmingham*. The Respondent had for years kept an account at the bank of the Appellants, and often had a considerable balance to his credit. In April, 1862, *William Bayley* opened an account at the Appellants' bank. *William Bayley* had often been a purchaser of coal from his father, and, in that way, many transactions on promissory notes had occurred between them. Notes, too, had

been passed by *William Bayley* into the Appellants' house, and had of late often borne the indorsement of the Respondent. On one or two occasions these notes had been dishonoured, and the Appellants had given formal notice to the Respondent of the fact. On the 6th of January, 1863, an event of that kind occurred, with respect to a note for £247. The Respondent, who seemed to have believed it to relate to a note he had indorsed, mentioned the matter to his son, who promised to provide for it. On the day following the notice, it was provided for by *William Bayley* depositing with the Appellants another note of the same amount, without the Respondent being farther troubled about the matter. *William Bayley*, however, had, without his father's knowledge, sent to the bank many notes apparently indorsed by his father, but of which the indorsements were forgeries by himself, and their amount at last reached a considerable sum. Suspicion having been excited, application was urgently made by the Appellants to the Respondent for a settlement, and this application produced the discovery that *William Bayley* had, in many instances, forged the indorsements of his father, whose liabilities, so created, had become very large. On the 18th of April, 1862, in consequence of communications made to him, the Respondent called, in company with his son, *Thomas Abishai Bayley*, at the Appellants' bank, and had an interview with Mr. *Deakin*, their manager, when the manager stated that *William Bayley's* liabilities were serious, but if he would act properly, and his friends would back him, all would be right. At this interview the Respondent distinctly denied that he had ever given his son authority to make these indorsements, and, on being informed that the amount was £6000 or £7000, said that he was an old man, and could not be expected to beggar himself, but was willing to do anything to assist in reason, and *Deakin* said that Messrs. *Williams* did not wish to exercise any pressure upon him.

On Monday, the 20th of April, there was a meeting of all the parties at the bank of the Appellants, when some statements were made as to *William Bayley's* means of meeting the notes which were out. At that meeting the Respondent, addressing his son, said, "Now, *William*, don't deceive the gentlemen, you say you can pay them £1000 a-year?" To which *William Bayley*

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answered, "Yes, father, I can." *Philip Williams* (one of the Appellants) thereupon said, "We shall have nothing to do with any £1000 a-year. If the bills are yours" (addressing the Respondent) "we are all right; if they are not, we have only one course to pursue; we cannot be parties to compounding a felony." There was afterwards a conversation, in the course of which the solicitor for the bankers said it was "a serious matter;" and the Respondent's solicitor added, "a case of transportation for life." Then there was a discussion about the means of meeting the difficulties in which *William Bayley* was placed by a partnership between him and his brother *Thomas Abishai Bayley;* and then again, by some charge upon his wife's property; but throughout all the conversations which took place, the Respondent never admitted any one of the indorsements to be his, or to have been authorized by him. Finally, after discussions of this kind, the solicitor for the Appellants expressed his belief that *William Bayley's* wife had no such interest in property as could be made a valid security, and said that they had been brought to the point from which they started, and could only look to the Respondent. The Respondent's solicitor, Mr. *Duignan*, refused to be a party to the Respondent making himself liable for the whole amount, and prepared to leave the room where the interview took place, when the Respondent (as it was alleged) said, "What be I to do? How can I help myself? You see these men will have their money." Mr. *Duignan* did leave the place, and, after he had gone, the following agreement was drawn up by the solicitor for the Appellants:

"*Wednesbury Bank,* 20th April, 1863.—To Messrs. *Philip* and *Henry Williams,* bankers, *Wednesbury.* In consideration of your consenting to give up to me the several under-mentioned bills and promissory notes, I hereby charge all that my colliery, situate at *Tipton,* in the county of *Stafford,* and known as the *Tipton Meadow Colliery,* with the engines, fixtures, and apparatus thereto belonging, and all other the hereditaments and premises described in the title deeds hereinafter mentioned, with the payment to you of £7203 14*s.* 6*d,* being the amount advanced by you on the said bills and notes. And I hereby agree to pay to you the said sum of £7203 14*s.* 6*d.*, and I agree to deposit with you the several title deeds and writings relating to the said *Tipton*

Meadow Colliery by way of equitable mortgage, for securing payment to you of the said sum of £7203 14*s.* 6*d.*"

To this agreement a list of notes, making up this amount, was appended. These notes were delivered up to the Respondent. On the following day the Respondent deposited with the Appellants' solicitor a bundle of deeds. It turned out that all the proper deeds had not been brought. The others were afterwards brought, and a more formal agreement, but exactly to the same effect, was prepared by the solicitors for the Appellants, and was signed by the Respondent on the 22nd of April, 1863.

On the 25th of April, 1863, the Respondent drew a cheque on the Appellants' bank for £5000, in order to transfer that sum to the bank of Messrs. *Duignan & Co.*, at *Walsall.* This cheque was returned by post. On the same day the Respondent's solicitor wrote a letter complaining of the agreement which had been entered into against his advice, declaring it to have been obtained under influences improperly exercised, and announcing that he had been instructed to apply for the restoration of Mr. *Bayley's* deeds, and offering to return "the documents" [the notes] which Mr. *Bayley* had received from the Appellants. This was refused.

On the 27th of April, 1863, *William Bayley* was adjudicated a bankrupt, on the petition of the Respondent; he had absconded two days before that time.

On the 1st of May, 1863, the Respondent commenced an action in the Court of Exchequer against the Appellants, to recover a sum of £6704 13*s.* 9*d.*, being the balance standing in his name in the books of the Appellants' bank, and also for dishonouring his cheque for £5000.

On the 19th of May, 1863, the Appellants brought an action in the Court of Queen's Bench to recover the amount claimed by them on the agreement of the 20th of April.

The Respondent filed his bill, which was amended and re-amended, in the Court of Chancery, setting forth the above transactions, and praying that the agreements, dated on the 20th and 22nd of April, might be declared invalid, and be ordered to be delivered up to be cancelled. Answers were put in and evidence taken, and the cause came on for hearing before Vice-Chancellor *Stuart*, who, on the 7th March, 1865, made a decree to that effect,

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and directed the Respondent to deliver up to the Appellant the notes in respect of which the agreements had been made (1). This appeal was then brought.

Sir *H. Cairns*, Q.C., and Mr. *E. K. Karslake* (Mr. *Kingdon* was with them), for the Appellants:—

The mistake of the Vice-Chancellor was this, he assumed that all the negotiations were on the footing of the indorsements being forgeries. That was not so. The Appellants did not know that they were forgeries, and had reason to believe that the acts of *William Bayley* had been done with the knowledge and assent of the Respondent, although it was possible that in the amounts he might have exceeded his authority. The father's silence after notice encouraged this belief. The dealings between the parties were therefore always on the footing of the settlement of a simple civil liability. Asserting that, as between themselves and the Respondent, the Respondent was liable, the Appellants also believed that *William* was liable to the Respondent, and were quite willing to join in any arrangement by which that liability might be satisfied. This was the first object of the negociations. It was found that *William* had not the means of giving the proper security, and then it was arranged that the Appellants should give up the notes to the Respondent, he giving them security for their amount, so that he would then be put in the best position to assert his claims against his son. The only pressure exerted on the Respondent was the pressure of a civil liability, which by his own conduct he had incurred. [LORD CHELMSFORD:—In their answer the Appellants never suggest that the Respondent was civilly liable.] One test of the true nature of the transaction is this: suppose it was legal to compromise a felony, and to allege such compromise as a ground of liability, there was nothing done here which could support such an allegation. In fact there was no such compromise. In a case of this kind, which occurred before Lord *Ellenborough*, *Wallace* v. *Hardacre* (2), his Lordship said, that if any act could be shewn which was done to stifle a prosecution, the action could not be maintained, but otherwise, the mere sub-

(1) 4 Giff. 633. See a note by the learned reporter, p. 663.
(2) 1 Camp. 45.

stitution of good notes for those which had been forged would not invalidate the Plaintiff's right to recover upon them. There was no attempt here to stifle a prosecution; all that was done was to enforce an existing civil liability. In *White* v. *Spettigue* (1), trover was held to be maintainable to recover the value of goods which had been stolen from the Plaintiff, though he had not then taken any steps to prosecute the thief. In that case there was no antecedent debt, as there was here, and that circumstance made the decision in *Chowne* v. *Baylis* (2), that the civil remedies are suspended until after the conviction of the felon, inapplicable, for there the only debt was that which was constituted by the felony of the clerk. In *The Dudley and West Bromwich Banking Company* v. *Spittle* (3), where the debt likewise arose out of the felonious act of the debtor, the general right to sue in respect of it was not denied, though it was held that the civil remedy was suspended till the prosecution was instituted. *Stone* v. *Marsh* (4), which afterwards came up to this House (5), established the doctrine that civil remedies might exist in cases where felonious acts had been committed. The authorities on the criminal law, *Hale* (6), *Hawkins* (7), and *Russell* (8), all shewed that there must be a knowledge that a felony had been committed before there could be any misprision of felony, for that phrase meant the knowledge that there had been a felony, and the wilful attempt to conceal it. Here the Appellants had reason to believe that whether the name of the Respondent was written by himself or not, it was written upon sufficient authority from him in the course of the dealings in which both father and son were engaged. The Courts would not presume that an agreement of this kind was corrupt, but would require distinct evidence that it was so: *Ward* v. *Lloyd* (9). *Reg.* v. *Hardey* (10) proceeded on the principle that though indictments, even for misdemeanours, could not be the subject of a reference, still where a verdict of acquittal was taken on them, because no evidence to sustain them was produced, there was

(1) 13 M. & W. 603.
(2) 31 Beav. 351; 8 Jur. N.S. 1028
(3) 1 J. & H. 14.
(4) 6 B. & C. 551.
(5) Nom. *Marsh* v. *Keating*, 2 Cl. & F. 250.
(6) Book 2, c. x.
(7) Book 1, c. vii.
(8) Vol. ii. 741-2. Greaves' Ed.
(9) 6 Man. & G. 785.
(10) 14 Q. B. 529.

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nothing illegal in referring at the same moment all matters in difference between the parties, though such matters were those which had constituted the groundwork of the indictment. In *De Tastet* v. *Carrol* (1), it was held that a transfer of property to a creditor, made on the eve of bankruptcy, under fear of criminal proceedings, is valid.

The *Attorney-General* (Sir *R. Palmer*), and Mr. *F. W. E. S. Everitt*, for the Respondent:—

It is impossible to doubt that when a father knows that his son has committed forgery the holder of the forged instrument possesses a power, and exercises an influence over him, which the law considers undue pressure, and therefore will not allow securities obtained from him under such pressure to be enforced against him. In *Ex parte Critchley* (2) a charge of embezzling was pending: the magistrate doubted whether there was not a partnership between the prosecutor and the accused. A warrant of attorney was given to secure payment of the money charged to have been embezzled, and the charge was withdrawn. It was held that the warrant of attorney was invalid, because at the time of giving it a charge of a criminal nature was pending which it was calculated to bring to an end. A similar principle was acted on in *Osbaldiston* v. *Simpson* (3), where the alleged offence was cheating at cards, and the punishment would only have been a liability to penalties under the 9 Anne, c. 14. Even in matters not absolutely criminal, but which are prohibited, the law will not allow itself to be thus defeated by private agreements. In *Osborne* v. *Williams* (4), a father commanded a post office packet; with the approbation of the Postmaster General he sold it to his son, but, by a private agreement between the father and the son, the latter was only to hire the vessel at a settled rent, being allowed £200 per annum for the command. This was held to be a fraud on the Ship Registry Acts, and an account was decreed. That shews that the argument of *in pari delicto* would not prevent the application of the general rules of law in such a case. Where a transaction is

(1) 2 Rose, 462; 1 Stark. 88. See Mont. Bky. Rep. 138 and 153, where the whole history of the case is given.
(2) 3 Dowl. & L. 527.
(3) 13 Sim. 513.
(4) 18 Ves. 379.

contrary to public policy it will not be binding: *Neville* v. *Wilkinson* (1). *Walker* v. *Hardacre* (2) is not in point. All that was done there was merely to substitute good notes for bad ones. Of course, there could be no difficulty in suing on the good notes. And *Ward* v. *Lloyd* (3) is not applicable to this case, for there the debtor was merely making a provision for his own lawful debt; he himself denied that he had ever been in fear of a prosecution; and the Court did not think there was sufficient evidence of the fact of a corrupt agreement. Here there was no debt by the Respondent: his name had been forged, and forgery cannot create a debt. In *Roche* v. *O'Brien* (4), a reversionary grant obtained by fraud was set aside, though it had been thirty-four years in existence, and had been confirmed by subsequent acts; and a deed confirming a grant impeached by suit, and compromising rights, the subject of the suit, though obtained from a person apprised of his rights, was set aside, he being compelled to accede to the terms from distress and poverty, occasioned by the party procuring the confirmation. There *Martin* v. *Littlehales* (5) was referred to, where bonds had been executed, against which relief was given, because the party executing them was under difficulties, and was not then *sui juris*. If that was so in a matter where merely civil rights were concerned, how much more strongly would that principle apply where the party executing an agreement like this was under the influence of a fear of a criminal prosecution, a prosecution for forgery, against his own son! The pressure that could be exerted on a father under such circumstances is enormous. It is against public policy to allow such an agreement, so obtained, to be valid. In all the cases the consideration of public policy was a great ingredient in the decision. On public policy the decision in *Egerton* v. *Brownlow* (6) wholly proceeded. All these cases were considered in the *Dudley and West Bromwich Banking Company* v. *Spittle* (7), where, it is true, that the civil remedy was said to be only suspended, but where all that was done to enforce a civil remedy was done after the party had first discharged his duty to the state by instituting

(1) 1 Bro. C. C. 543.
(2) 1 Camp. 45.
(3) 6 Man. & G. 785.
(4) 1 Ball & Bea. 330.
(5) 1 P. Wms. 75, *n.*
(6) 4 H. L. C. 1.
(7) 1 J. & H. 11.

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criminal proceedings. *Chowne* v. *Baylis* (1) likewise treated the civil remedy as only suspended, but there the offender was prosecuted and convicted before the debt was attempted to be enforced. Here there can be no doubt that the scheme was to suppress or stifle a prosecution, and that all the parties proceeded with a view to accomplish that object. Agreements made with such an object are void.

Sir *H. Cairns* replied.

THE LORD CHANCELLOR (Lord *Cranworth*):—

My Lords, although the facts of this case are somewhat complicated, and extend over a considerable length of time, I do not think it is necessary, in giving the advice I am about to tender to your Lordships, that I should go into any detail of the facts, because, having occupied the consideration of the House for two or three days, they are, I am quite sure, present to the minds of all persons concerned. It will be sufficient, I think, to start from this point, that on Friday the 17th of April, 1863, the father being at a railway station, and circumstances having arisen which caused these bankers to have doubts about the signatures to certain bills or promissory notes, and the bankers wishing to satisfy themselves whether a signature was, as it purported to be, that of the father, *James Bayley*, they presented to him a note for £500 made by the son, and purporting to contain the father's signature, and asked him whether that was his signature. The father denied it. The bank manager, who was present, was much surprised to find that the signature was not correct, and it was arranged that the matter should be looked into, that it should stand over then, and that there should be another meeting with the parties on the following day. It appears that, in the course of the evening of that day, the son, *William Bayley*, was communicated with. He was informed of what had taken place; and, I suppose, the conclusion was come to in the family that the son had been in the habit of using his father's name without his sanction. I say "using his father's name without his sanction," for I have no doubt at all in coming to the conclusion (there is not a tittle of evidence to the contrary) that all these signatures were forgeries. That they

(1) 31 Beav. 351, 8 Jur. N. S. 1028

were not the signatures of the father is clear, and I do not think there is the smallest reason to suppose that he ever gave his son any express or implied authority to sign the bills in his name.

This matter appears to have come to the knowledge of the family on the evening of the same day. One member of the family, *Thomas Abishai Bayley* (another son of the Respondent and brother of *William*), who is not at all involved in these transactions, went with his father to the bank, and then considerable negotiation took place. It is obvious that at that time the bankers must have seen that they were in great jeopardy as to the notes, and that they would probably lose their money unless the father came in and assisted the son. I cannot, however, but come to the conclusion, from the evidence, that they strongly suspected, indeed they must be said to have known, that these signatures were forgeries. If the signatures were forgeries, then the bankers were in this position, that they had the means of prosecuting the son. That was clear.

Now the question is, what was the sort of influence which they exercised on the mind of the father to induce him to take on himself the responsibility of paying these notes? Was it merely, we do not know these to be forgeries, we do not believe them to be so, but your son is responsible for them, and if you do not help him we must sue him for the amount? Or was it, if you do not pay these notes we shall be in a position to prosecute him for forgery, and we will prosecute him for forgery? What is the fair inference from what took place?

I do not know what may be the opinion of the rest of your Lordships, but I very much agree with the argument of Sir *Hugh Cairns*, that it is not pressure in the sense in which a Court of equity sets aside transactions on account of pressure, if the pressure is merely this: "If you do not do such and such an act I shall reserve all my legal rights, whether against yourself, or against your son." If it had only been, "if you do not take on yourself the debt of your son, we must sue you for it," I cannot think that that amounts to pressure, when parties are at arms' length, and particularly when, as in this case, the party supposed to be influenced by pressure had the assistance of his solicitor, not, indeed, on the first occasion, but afterwards, before anything was done. But if what really takes place is this: If you do not

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assist your son, by taking on yourself the payment of these bills and notes on which there are signatures which are said, at least, to be forgeries, you must not be surprised at any course we shall take, meaning to insinuate, if not to say, we shall hold in our hands the means of criminally prosecuting him for forgery. I say, if it amounts to that, that it is a very different thing. When the parties met on Saturday, there was a very significant expression made use of by Mr. *Deakin*, the manager, in the presence of one of the bankers, *Henry Williams*, "We do not wish to exercise pressure on you if it can be satisfactorily arranged." Does the "pressure" mean a pressure arising from our exercising the power, or keeping in our hands the means of exercising the power, of instituting a criminal prosecution? Or does it mean the "pressure" of getting you to make yourself responsible for your son's debt? It must have meant the former, because the context shews that the other was alternatively provided for. When it was said, we do not wish to exercise pressure if it can be satisfactorily arranged, that could not mean, if you take on yourself the debt, without pressure, we don't mean to press you. That would be nonsensical. But, on the other interpretation of the words, the sense is very plain. "If you can satisfactorily arrange this, and if you choose" (according to another expression that was used) "to treat it as a matter of business," that is, to take upon yourself the debt, we will not exercise "pressure." Of course not. The "pressure" there referred to must be something different from merely obtaining the security of the father. It amounts to this: "Take your choice—give us security for your son's debt. If you take that on yourself, then it will all go smoothly; if you do not, we shall be bound to exercise pressure;" which could only mean, to exercise those rights which remain to us, by reason of our holding signatures forged by your son.

That is what took place on the 18th. It was then arranged that there should be another meeting on the 20th. It was urged in the argument, that the bankers could not have contemplated a prosecution, because they allowed two days to elapse, during which the son might have escaped. But all parties supposed that the father could prevent the prosecution by giving what the bank required. On Monday, the 20th, the parties met, the father, the

son, and other members of the family, with the father's solicitor, all met at the bank office. On that occasion, farther conversation takes place. There had been some negotiations going on, to see how the debts of the son could be met or satisfied, what assets he had, and so forth. The father said something about the son paying the bankers by instalments of £1000 a-year. To which one of the bankers answered, "We shall have nothing to do with any £1000 a-year. If the bills are yours" (addressing the Plaintiff) "we are all right. If they are not, we have only one course to pursue; we cannot be parties to compounding a felony." Now, according to my interpretation of the law, it does not amount to compounding a felony. But one sees clearly what the parties meant. It was this: If you choose to take on yourself the responsibility of these bills, all will be right; but if not, we cannot be parties to what they call "compounding a felony;" but what Lord *Ellenborough* more correctly called "stifling a prosecution." I think that is the only interpretation that can possibly be put on what passed. Then, in the course of this same conversation, the solicitor of the bankers said, "Yes, it is a serious matter," and Mr. *Duignan* remarked, "it is a case of transportation for life." Now that was said in the hearing of the bankers. They must have heard it. They must have known, while all these negotiations were going on, that all the parties to them understood that this was a case, not of life or death, but of transportation for life. The father, then, was acting in this matter under the notion that if he did not interfere to save his son, the latter would be liable to be prosecuted, and, probably, would be prosecuted for forgery, and so be transported for life.

Then that being, as I think, the clear inference from all the evidence, the question arises: What is the law applicable to such a case? These bankers hold a number of acceptances which one can hardly suppose they did not believe to be forged acceptances. I say that because they never suggest any doubt on the subject. Although the bill of the Plaintiff was amended and re-amended, and in the last re-amended bill there is a special charge that the bankers never suggested that the notes, which certainly were not in the Plaintiff's handwriting, were signed with the privity of the Plaintiff, the bankers, in answering that bill, never deny that; but,

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on the other hand, one of the witnesses, *Thomas Bayley*, I think, says that during the whole meeting no such suggestion was ever made. I asked Sir *Hugh Cairns*, in the course of his argument this morning, if he could point out any suggestion of that kind as having been made; but the only approach to such a suggestion that he could refer to was a question addressed to the father, as to one of the notes, to this effect: "Why did you not answer the letter informing you that it was dishonoured?" It is very true that lawyers might fully understand what that might mean, but I cannot think that that could possibly be understood by the parties as amounting to this, that we do not admit that these indorsements, though not in your handwriting, were not signed by your authority. I think that is an inference which, under all the circumstances of this case, never could be dreamt of as deducible from what so passed. That being so, I think the case in point of fact is this:—Here are several forged notes. The bankers, in the presence of the father and of the person who forged them, both being persons of apparent respectability in the country, carrying on business as tradesmen, and the father having the presence and the assistance of his solicitor, the bankers say to him what amounts to this: "Give us security to the amount of these notes, and they shall all be delivered up to you; or do not give us security, and then we tell you we do not mean to compound a felony; in other words, we mean to prosecute." That is the fair inference from what passed. Now is that a transaction which a Court of equity will tolerate, or is it not? I agree very much with a good deal of the argument of Sir *Hugh Cairns* as to this doctrine of pressure. Many grounds on which a Court of equity has acted in such cases do not apply in this case. The parties were not standing in any fiduciary relation to one another; and if this had been a legal transaction I do not know that we should have thought that there was any pressure that would have warranted the decree made by the Vice-Chancellor. But here was a pressure of this nature. We have the means of prosecuting, and so transporting your son. Do you choose to come to his help and take on yourself the amount of his debts—the amount of these forgeries? If you do we will not prosecute; if you do not, we will. That is the plain interpretation of what passed. Is that, or is it not, legal? In my opinion,

my Lords, I am bound to go the length of saying that I do not think it is legal. I do not think that a transaction of that sort would have been legal even if, instead of being forced on the father, it had been proposed by him and adopted by the bankers; and I come to that conclusion upon this short ground, that in *Wallace* v. *Hardacre* (1), although the decision there, founded upon the facts of that particular case, was against the view I am taking, yet there Lord *Ellenborough* positively states that which has always been understood to be the correct view of the law upon this subject, namely, that although in that case there was no reason for treating the agreement as invalid, yet it would have been otherwise if the agreement had been substantially an agreement to stifle a criminal prosecution. And although that was merely a dictum in a *nisi prius* case, yet on all occasions I have found, on looking at the reports, by the late Lord *Campbell*, of Lord *Ellenborough's* decisions, that they really do, in the fewest possible words, lay down the law, very often more distinctly and more accurately than it is to be found in many lengthened reports; and what is so laid down has been subsequently recognised as giving a true view of the law as applied to the facts of the case. Now, is the agreement in question, or is it not, one the object of which is to stifle a criminal prosecution? If there be any case in which that character can be properly given to an agreement I think that this is such a case, and therefore, in my opinion, the decree is perfectly right. Yet I am bound to say, speaking only for myself, I do not think that on the mere grounds upon which it is put by the Vice-Chancellor I should have been inclined to concur with him. At the same time, he, having the whole of the facts before his mind, came substantially to the same conclusion, although he did not express exactly the same grounds on which I rest the propriety of the decree. I have, therefore, no hesitation in moving your Lordships that this appeal be dismissed, with costs, and that the decree be affirmed.

LORD CHELMSFORD:—

My Lords, I agree with my noble and learned friend on the woolsack, that the object of the arrangement between the parties

(1) 1 Camp. 45.

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was to save *William Bayley* from a prosecution for forgery; and I make that the foundation of the opinion which I have formed with regard to the agreement having been extorted from the father by undue pressure. It appears to me to be quite clear that the negotiations between the parties proceeded upon the footing of forgery having been committed by *William Bayley*, and of his being liable to a criminal prosecution; and that the bankers, both personally, and by means of their agents, Mr. *Thursfield* their solicitor and Mr. *Deakin* their manager, availed themselves of the fears of the father for the safety of his son, to press the arrangement upon him.

It is unnecessary to refer to various passages of the evidence to establish this point. It is sufficient to take the expression of *Philip Williams*, so often adverted to in the argument, and also by my noble and learned friend. In the affidavit of Mr. *Deakin* it is stated that he said, "If the bills are yours" (addressing the Plaintiff) "we are all right. If they are not, we have only one course to pursue—we cannot be parties to compounding a felony." I think the interpretation which my noble and learned friend has put upon those expressions is perfectly correct. Then, again, in the answer of the bankers, there is this paragraph: They, *Henry Williams* and *Philip Williams*, say that they "believe that the said Mr. *Thursfield* did once, in the course of the discussion, say, 'it is a serious matter,' and that Mr. *Duignan* immediately said 'it is a case of transportation for life;' but Mr. *Thursfield* had not said for whom or in what respect it was a serious matter; and no remark was made upon the succeeding observation of the said Mr. *Duignan*, namely, that 'it was a case of transportation for life.'" But it is quite clear that Mr. *Duignan* understood the meaning of the expression of Mr. *Thursfield* that "it was a serious matter," and Mr. *Thursfield* accepted the interpretation of Mr. *Duignan* that "it was a case of transportation for life."

Then, again, I must also advert to the suspicious expression (which has been referred to by my noble and learned friend) of Mr. *Deakin*, that "the Messrs. *Williams* did not wish to exercise any pressure on the Plaintiff if it could be satisfactorily arranged," which evidently shews what was passing at least in Mr. *Deakin's* mind upon this subject. It was never suggested throughout

the whole negotiation that there was any civil liability on the part of the father. You have the evidence on that subject of *Thomas Abishai Bayley*, who is said to be a person of very excellent character. He says, "at none of the interviews referred to, nor at any other time, in my presence or hearing, was it ever alleged or suggested by the Defendants, or either of them, or by any one on their behalf, that the Plaintiff's signatures to the said promissory notes were either in his handwriting, or made with his knowledge, permission, privity, or sanction; nor was it even contended or suggested by the Defendants, or by any one on their behalf, that the Plaintiff was, or was considered to be, in any way personally liable to the Defendants upon them."

It was asked by Sir *Hugh Cairns* this morning whether there was anything that could be used against the bankers to prevent their insisting on the liability of the father. Probably not. But the questions in this case are: what was the nature of their defence; whether they have insisted at any time that there was any civil liability on the part of the father. Now, let us look at the way in which they put their case in their answer. They say, "The Plaintiff rests his case mainly on two grounds; first, that the transactions which led to the said agreements were equivalent to compounding a felony; secondly, that he was induced by force to execute them. But we say, first, that if any felony was committed (which we do not admit, but which is, as we insist, immaterial as regards the question in this suit), we never compounded it, that is to say, we never forbore, or agreed to forbear, an intended prosecution for it, or even threatened or contemplated a prosecution; and secondly, we say that no force whatever was used against the Plaintiff. He had the advice of his solicitor throughout the negotiations which led to his signing the agreements." Therefore they place their defence entirely upon those two grounds. That there was no compounding of felony, even if a felony had been committed; and that there was no force used, no undue influence exerted on the Plaintiff, who acted throughout on the advice of his solicitor.

Then the defence of the bankers being rested entirely on these two grounds, as I have already said, in my opinion, this negotiation proceeded upon an understanding between the parties that

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the agreement of *James Bayley*, to give security for the notes, would relieve *William Bayley* from the consequences of his criminal act; and the fears of the father were stimulated and operated on to an extent to deprive him of free agency, and to extort an agreement from him for the benefit of the bankers. It appears to me, therefore, that the case comes within the principles on which a Court of equity proceeds in setting aside an agreement where there is inequality between the parties, and one of them takes unfair advantage of the situation of the other, and uses undue influence to force an agreement from him. Therefore, I agree in thinking that this appeal ought to be dismissed, and the decree of the Vice-Chancellor affirmed, with costs.

LORD WESTBURY:—

My Lords, there are two aspects of this case, or rather two points of view, in which it may be regarded. One of them is; was the Plaintiff a free and voluntary agent, or did he give the security in question under undue pressure exerted by the Defendants? That regards the case with respect to the Plaintiff alone. The second question regards the case with reference to the Defendants alone. Was the transaction, taken independently of the question of pressure, an illegal one, as being contrary to the settled rules and principles of law?

Now, with regard to the first point, namely, whether this was the voluntary act of the Plaintiff, I would put two questions; first, what was the basis of the transaction or negotiations, between the Appellants and the Respondent, that led to giving the security in question? And, secondly, what was the motive, or inducement, that was brought to bear on the Respondent in order to induce him to give the security?

It was skilfully contended on the part of the Appellants, by the learned Counsel, that the basis of the transaction was either the actual or the possible liability of the father to the debt. But that is an argument wholly unsupported by the evidence; and, on the contrary, it is in every way contradicted by the evidence. There is no ground for concluding, from anything that has been said, that the bankers treated the father as a person who was civilly responsible. There was no attempt on the part of the son, *William*

Bayley, notwithstanding his distress, to assert at any time that he had the authority of his father; in point of fact, the father's aid is invoked throughout upon the basis that the son alone was liable, and that, in addition to civil liability, he had contracted a criminal liability. Now that is apparent, not only from the passages which have been read by my two noble and learned friends, but from the whole conduct of the Appellants. It must be remembered throughout, that the Appellants did not speak out distinctly, for the reason that is given by one of them in a passage that has been referred to, namely, that they could not in any manner be implicated in compounding a felony.

Again, there is a small incident that brings home, at least to my mind, in a satisfactory manner, the truth of the conclusion that the criminal liability of *William Bayley* was the basis of the whole transaction, and that is the circumstance that *Henry Williams* wrote on a slip of paper, and communicated to his brother *Philip*, during the discussion, his own doubt whether the father might not be civilly liable. Now it is quite plain that if the discussion had proceeded, either wholly or partially, upon the notion that there might have been civil liability on the part of the father, the necessity for making such a suggestion by *Henry* to his brother *Philip* never could have arisen; and it is perfectly clear also from the fact of the slip of paper not being either read out or acted upon, but, on the contrary, being thrown into the fire by *Philip*, that he was willing that the transaction should go on on the basis on which it had been started, namely, that there was a *constat* of all parties that the forgeries had been committed, and that *William Bayley*, therefore, stood in the liability of a felon.

So much in regard to the basis of the transaction. Now what was the motive or inducement which was brought to bear on the Respondent? It is necessary to examine a little what was the history of the proceedings, and the interviews that took place. It is perfectly clear that, in the outset, there was a desire on the part of the bankers, and certainly a very great desire on the part of the solicitor for the Respondent, Mr. *James Bayley*, that security should be given for the amount of the debt by means of the property of *William Bayley* himself, and by means of the property of his wife. There was an attempt made to carry out that mode of

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securing the debt; and that mode undoubtedly might not have been attended with any objectionable character, so far as the father was concerned. The mode suggested was, that the property of *William* should be valued; that his brother *Thomas* should enter into partnership with him; that *Thomas* should be responsible for one-half of the amount of the valuation, and that the father should add to *Thomas's* liability his own liability; and that the amount of the debt thus incurred by *Thomas* and the father should be made available for the partial payment of the bankers. In addition to that, it was proposed that the residue of the debt should be secured by the property of the wife.

Now I desire your Lordships to remark particularly that when that failed, upon the fact being ascertained that the property of the wife could not be made the subject of a security, there remained only the application to the father, and the inducing the father at once to take on himself the whole debt of the dishonoured bills of the son. It is very distinctly stated by several witnesses, and though it is partially denied, yet it is but imperfectly denied (for it is denied only to the extent of recollection and belief, and the facts speak for themselves), that after the attempt to get a good and unobjectionable security failed, the discussion did not terminate, but it was renewed on the basis of the Plaintiff's coming forward to relieve his son from the situation of peril in which he was placed. The bankers admit, most clearly and distinctly, that they all knew that it was a case of transportation for life. It is perfectly clear that they did not pretend that the father was liable. What remained then as a motive for the father? The only motive to induce him to adopt the debt, was the hope that by so doing he would relieve his son from the inevitable consequences of his crime.

The question, therefore, my Lords, is, whether a father appealed to under such circumstances, to take upon himself an amount of civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with the certainty of conviction, can be regarded as a free and voluntary agent? I have no hesitation in saying that no man is safe, or ought to be safe, who takes a security for the debt of a felon, from the father of the felon, under such circumstances. A contract to give security

for the debt of another, which is a contract without consideration, is, above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father who is brought into the situation of either refusing, and leaving his son in that perilous condition, or of taking on himself the amount of that civil obligation.

I have, therefore, my Lords, in that view of the case, no difficulty in saying that, as far as my opinion is concerned, the security given for the debt of the son by the father under such circumstances, was not the security of a man who acted with that freedom and power of deliberation that must, undoubtedly, be considered as necessary to validate a transaction of such a description.

My Lords, I would add to that, the great folly, nay, impropriety, of the bankers proceeding to take this security from the defenceless old man after his solicitor had left him, protesting in such an emphatic manner against the proceedings which he knew they were about to enter upon. The Respondent's solicitor remained so long as a valid contract, namely, that touching the property of *William Bayley*, was regarded as possible. When that was impossible, and the bankers began to exert pressure on the father, the solicitor left, remonstrating with all parties against the impropriety of what they were about to do.

My Lords, there remains the other aspect of the case, which is this: Was the transaction, regarded independently of pressure, an illegal one, as being contrary to the settled rules and principles of law. Now I concur in a good deal that was said by the learned Counsel for the Appellants, namely, that if there be an existing debt, to which is superadded an independent security, or if there be a valid legal document in existence, and then a transaction which is open to the charge of forgery, the contract touching the existing debt is not affected by the superadded engagement which may be invalid on the ground of forgery. For example, if I have lent a man £10,000 on the security of an insufficient estate, and he, some time afterwards, brings me a bill of exchange with a forged acceptance, to induce me to forego

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exercising my right with respect to the mortgage, that mortgage will not be affected by the forgery, and I may abstain from dealing with the forgery, and, nevertheless, pursue my remedy on the original contract. But this is not a case where the bankers are proceeding as against the person liable to them on a contract independent of the forgery. We must take the nature of the contract from the agreement which was entered into, the original agreement, written at the moment, which, no doubt, clearly expresses what was in the mind of the father. The liability of the father is created and embodied in this memorandum, in which, addressing the bankers, the father says, "In consideration of your consenting to give up to me the several under-mentioned bills and promissory notes, I hereby charge my colliery." It is impossible, therefore, to have any hesitation as to the fact that the liability of the father is obtained entirely by the consideration of the bankers delivering up the acceptances. That is a wholly different case from the one to which I have referred as put in the argument at the bar.

Now, such being the nature of the transaction, my Lords, I apprehend the law to be this, and unquestionably it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. But that is the position in which these bankers stood. They knew well, for they had before them the confessing criminal, that forgeries had been committed by the son, and they converted that fact into a source of benefit to themselves by getting the security of the father. Now, that is the principle of the law and the policy of the law, and it is dictated by the highest considerations. If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offence would be committed. And that is what, I apprehend, the old rule of law intended to convey when it embodied the principle under words which have now somewhat passed into desuetude, namely, "misprision of felony." That was a case when a man, instead of performing his public duty, and giving information to the public authorities of a crime that he

was aware of, concealed his knowledge, and, farther, converted it into a source of emolument to himself.

It is impossible, therefore, if you look at this matter wholly independently of the question of pressure, and confine your attention to the act of the bankers alone, not to come to the conclusion that a great *delictum* was committed when the transaction is viewed simply with reference to the course which they took.

I asked, in the first place, were you not well aware that these bills were forgeries? That is perfectly true. Did you not obtain an additional advantage and benefit; in fact, the payment of your debt by trading with these bills? That is undoubtedly true. Were you not very well aware that when you so traded with these bills you would either prevent the possibility of a prosecution, or render the possibility of a prosecution so remote, that it could hardly be expected to succeed? That was the inevitable consequence. But if a man does an act which is attended necessarily with an inevitable consequence, he must be taken in law to have foreseen that consequence, and, in point of fact, to have deliberately intended that it should be the result of his action. Here you have these bankers violating that rule of policy, and that rule of justice and morality, by using these forged bills to extort from the father a security which he was not liable for, they giving up the bills, and thereby violating their duty, and placing the parties in a situation in which the demands of public justice could not by any possibility be complied with.

My Lords, I regard this as a transaction which must necessarily, for purposes of public utility, be stamped with invalidity, because it is one which undoubtedly, in the first place, is a departure from what ought to be the principles of fair dealing between man and man, and it is also one which, if such transactions existed to any considerable extent, would be found productive of great injury and mischief to the community. I think, therefore, that the decree which has been made in this case is a perfectly correct decree.

I do not mean for one single moment, by anything I have said, to cast any imputation on the character of these gentlemen. I am only dealing with abstract principles of law. They might, perhaps, fairly have thought that they were doing the best for the family of Mr. *William Bayley* and for the father. I beg particu-

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larly that it may not be understood that I mean to convey, by any words that I have used, any reproach on their character. I have used those words as necessary to vindicate the policy and justice of the rule of law, and to shew how highly requisite it is that a Court of equity should undo a transaction such as this, whether it is regarded as proceeding from a father who cannot be considered as a voluntary agent, or, taking the other aspect of it, as violating the rules of law which prescribe the duties of individuals under such circumstances. On both of these grounds I think that this is a transaction which ought to be set aside.

Decree or Order affirmed, and Appeal dismissed with costs

Lords' Journals, 21st June, 1866.

Solicitors for the Appellants: *S. F. Miller & Son.*
Solicitor for the Respondent: *W. H. Duignan.*

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May 7, 8, 11;
June 22.

JOSEPH LYLE . . . . . APPELLANT (1);

AND

JOHN RICHARDS AND OTHERS . . . . RESPONDENTS.

Ambiguity—Deed—Extrinsic evidence—Boundaries.

Parcel or no parcel is a question of fact for the jury, but the Judge is bound to tell the jury what is the proper construction of any documents necessary to be considered in the decision of that question.

In a "sett," or lease, of a mine, the boundary line was thus described, "a line drawn from *J. V.'s* house," to a bound-stone; and in the description of the parcels in the lease, it was said, "which said premises are particularly described by the map on the back of this sett." On this map the boundary line appeared to be drawn from the north-east corner of the house. The position of the house itself was incorrectly represented on the map:—

Held, that the Judge was bound to look to the map as forming part of the deed, and (*diss* Lord *Westbury*) to tell the jury that the line was to be drawn as marked on the map.

Per Lord *Westbury*:—In this case, it being ascertained that the house itself was incorrectly laid down in the map, it was impossible to know

(1) *Joseph Lyle* was the original Plaintiff. He died after the case was taken by appeal to the House of Lords. His executors were substituted for him in the appeal, but, for convenience sake, his name alone is retained.

by an examination of the deeds, or by their construction alone, from what corner of the house the boundary line was to be drawn; that consequently there was a latent ambiguity, which was to be determined by evidence, and was not dependent on construction.

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THIS was a proceeding in appeal under the *Common Law Proceedure Act*, 1854. The Plaintiff *Lyle* brought, in the Court of Queen's Bench, an action of trespass against the Defendants, and the first count of the declaration charged that they broke and entered a certain mine of the Plaintiff in the county of *Cornwall*, known as the *West Basset Mine*, and carried away copper ore, &c. The second count charged them with taking the Plaintiff's copper ore. The particulars of demand claimed the value of the ore actually taken as amounting to above 4000*l*. The whole damages were laid at 10,000*l*.

The Defendants (who did not deny the possibility of a trespass to a certain extent, but who insisted that the Plaintiff claimed too extensive a boundary line), paid 525*l*. into Court, and pleaded that that sum was sufficient to satisfy the claim of the Plaintiff. Issue was taken on that plea. The question between the parties related entirely to the boundary between their respective mines. The *West Basset Mine* (formerly called the *Wheal Haste Mine*) of which the Plaintiff was the lessee, was situated to the north of the *South Wheal Frances Mine*, of which the Defendants were the lessees. The lessor of both parties was Lady *Basset*.

The cause was tried at the *Cornwall* Summer Assizes of 1858, before Mr. Baron *Channell*, when it appeared that in 1835 Lady *Basset* granted to *Wm. Richards* a lease or "sett" of a mine in which the boundaries, so far as they affected this case, were thus described: "bounded on the north and west by the estate of *Bosleake*, the property of *Edward W. W. Pendarves*, Esq., and the estate of *Treskillard*, the property of Lord *Grenville*; on the south, *by a straight line of about* 355 *fathoms from John Vincent's house, at the south-west extremity of the sett, to a bound-stone at the north-west extremity of South Wheal Basset Sett*; and thence eastward, by the north side of the road leading to *Carnkie*, to a bound-stone fixed at the south-west corner of *North Wheal Basset Sett*, and thence due north by the magnet about 170 fathoms to a bound-stone fixed at the south-east corner of *Bosleake* estate, *and which*

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said premises are particularly delineated by the map on the back of this sett." In 1852 Mr. *Lyle*, who had become assignee of the 1835 lease, and had surrendered the remainder of the term for the purpose of obtaining a new lease, received from Lady *Basset* the grant of a lease of the same mine, and this new lease contained exactly the same description of the premises as that given in the lease of 1835, except that instead of the words, "due north by the magnet," the words were "in a northerly direction;" and in this lease of 1852 there was no reference to a map. It was on this lease of 1852 that the action was founded.

The map thus referred to in the lease of 1835 was produced, with that lease itself, at the trial. Evidence was given that *John Vincent's* house, as there depicted, was marked at least forty-four fathoms farther to the west, and also something farther to the south than it really was. The boundary line, as represented on the map, did appear to enter *John Vincent's* house at the north-east corner.

On the 17th of May, 1843, Lady *Basset* granted to *Wm. Reynolds*, his executors, administrators, and assigns, a sett of the *South Wheal Frances Mine*, in the description of the boundaries of which were the words, "and thence northwards, following the course of the river, and, as the right extends, to where it adjoins with the estate called *Treskillard*, the property of Lady *Grenville*, and thence eastward against the said *Treskillard* estate, to join the estate called *Filtrick*." A plan accompanied this sett. On the same day Lady *Basset* granted to *Wm. Reynolds* another sett, "to include the whole of the estate called *Filtrick*, and to extend from a stone post, marked "A" on the plan annexed thereto, fixed at the mouth of the lane or road leading from the piece to *Carnkye*, and which post is the north-west boundary of *South Wheal Basset Sett*; southward, against the western boundary of *South Wheal Basset Sett* as far as the right extends, to the high road, &c.," and thence "northwards by *Gryllis'* estate to join the *Wheal Haste Sett*, and thence eastward in a straight line against *Wheal Haste Sett* to the first-mentioned bound-stone at "A," and likewise to include the whole of the *Wastrel* plots, situate on the north, between *Filtrick* and the lands of Lord *Grenville*." To this sett also a plan was attached, and the description included the greatest part of that

which, according to the Plaintiff's contention, was the true boundary line of his sett. These deeds of 1843 were those under which the Defendants claimed.

The learned Judge treated the case as one depending on the construction of the deeds and the maps, and directed a verdict for the Plaintiff, but reserved leave for the Defendants to move to set aside this verdict, and to have a verdict entered for them, if the Court should think that the evidence for the Plaintiff did not sustain his claim, or to reduce the damages by assessing them on the footing of a different boundary line. A rule was accordingly obtained in November, 1858, to enter the verdict for the Defendants, on the ground that, according to the true legal construction of the setts, the southern boundary of the Plaintiff's mine was a line drawn from the north-east corner of *Vincent's* house to the bound-stone at the north-west extremity of *Wheal Basset Sett;* and also for a new trial on the ground that the verdict was against the evidence. When the rule was first called on for argument it was ordered to be suspended until the decision in the Court of Exchequer of a case of *Reynolds* v. *Buckley*, in which the question raised was, whether, under such circumstances as existed here, the matter was one of law for the decision of the Judge, or of fact for the determination of the jury. The Court of Queen's Bench, however, ultimately discharged the rule to enter a verdict for the Defendants or to reduce the damages, but the final decision was suspended until this appeal should be heard and decided on the other part of the rule. The Court of Exchequer Chamber reversed this judgment, and the appeal was against that reversal (1).

The *Solicitor-General* (Sir *R. P. Collyer*), and Mr. *Rolt*, Q.C. (Mr. *Henry Bullar* was with them), for the Appellant:—

The question here was really parcel or no parcel—which is a question of fact, and ought to have been decided by the jury, and not, as a matter of construction, by the Court. The deed of 1835 left it ambiguous where the boundary line was to be drawn—it referred to a house as something from which it was to be drawn—but a house has extent, and is not a mere point, and the ques-

(1) The case is not reported in the Court below.

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tion whether the line was to be drawn from one part of the house or the other was the very matter in dispute. The deed referred to the map. But though the line, as marked on the map, had been altered, and though the map appeared now to shew the part of the house whence the boundary line was to start, the map itself was erroneous as to the position in which it placed the house. Extrinsic evidence was, therefore, necessary to be resorted to, and was admissible: *Waterpark* v. *Fennell* (1), where such evidence was admitted to explain words in a deed, because those words were of a general nature, and of a doubtful import.

The ambiguity here was a latent ambiguity, and, therefore, extrinsic evidence was necessary to correct it: *Wigram* on Extrinsic Evidence (2). *Goodtitle* d. *Radford* v. *Southern* (3); *Paddock* v. *Fradley* (4); *Doe* d. *Freeland* v. *Burt* (5); *Smith* v. *Thompson* (6); *Bacon's* Maxims (7); *Llewellyn* v. *Jersey* (8); and *Morrell* v. *Fisher* (9); shew that a mere *falsa demonstratio* will not injure a previous good and complete description, The representation of *John Vincent's* house in the map was a false demonstration, and ought not to be regarded. The evidence was decisive on that point. It is difficult to see how this could be treated as a question of law, and even in the Court below the Lord Chief Baron said that a map was a matter for the jurymen, not for the Judge, to look at. [LORD WESTBURY:—The map is part of the sett of 1835; is not the construction of the deed the construction of the map which forms part of the deed?] It may be so; but as a matter of fact, not of law. Even supposing that the line might be taken from the north-east corner of *Vincent's* house, still it being clear that the house was placed by the map in a wrong position, the position of the house must be corrected, which could only be done by evidence, before the starting point of the line could be fixed. Otherwise a map confessed by all sides to be wrong in one important respect, and that too, one which must affect the position of the boundary line, would be treated as if it was entirely accurate, and, though inaccurate, would be made to give a meaning to words in a deed which were themselves doubtful.

(1) 7 H. L. C. 650.
(2) Prop. VII.
(3) 1 M. & S. 299.
(4) 1 C. & J. 90.
(5) 1 T. R. 701.
(6) 8 C. B. 44.
(7) Rule xxiii.
(8) 11 M. & W. 183.
(9) 4 Ex. 591.

If the Plaintiff is right in his contention, the argument stands thus; first, that the deed of 1852 must be construed by itself, and is sufficient to support his claim, and the deed of 1835 need not be, and ought not to be, looked at for the purpose of construing that of 1852, much less for the purpose of altering its effect as to the extent of the thing granted; and, secondly, that the deed of 1852 must be taken most strongly against the grantor, and most favourably for the grantee. But thirdly, if the deed of 1835 can be looked at to ascertain the meaning of the deed of 1852, then the map attached to the deed of 1835 being incorrect, parol evidence may be put in to shew what was the real position of *Vincent's* house, and that parol evidence must be determined upon by the jury: *Smith* v *Thompson* (1), where Mr. Justice *Maule* said (2), "Generally speaking, the construction of a written document is for the Court, but where it is shewn by extrinsic evidence that the terms of this deed are ambiguous, evidence is admissible to explain the ambiguity, and to shew what the parties really meant. When there is an election between two meanings, it is properly a question for the jury." If so, the decision of the Court below, which treated this as a matter of construction, and made that construction depend on a map admittedly erroneous, cannot be supported.

The *Attorney-General* (Sir *R. Palmer*), and Mr. *J. B. Karslake*, Q.C. (Mr. *Pinder* was with them), for the Respondents:—

It is not denied that in such a case as this evidence is admissible to explain what is doubtful upon the face of a written instrument, but that does not make the construction of that instrument a matter for the decision of the jury. In *Waterpark* v. *Fennell*, Lord *Wensleydale* said (3), "The construction of a deed is always for the Court, but in order to apply its provisions evidence is in every case admissible of all material facts existing at the time of the execution of the deed." By receiving the evidence the Court does not abandon its functions as having the right and duty of determining the construction of the deed, but only adopts the means more satisfactorily to discharge those functions. And it is the proper duty of the Court to instruct a jury as to the legal

(1) 8 C. B. 44. (2) 8 C. B. 59, 60. (3) 7 H. L. C. 650, 684.

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construction of the instrument. Evidence of fact is admissible; but not evidence of intention. The distinction is clearly expressed in *Drake* v. *Drake* (1). Here, after the admission of the evidence, the Court found that there was no matter of fact which that evidence was required to supply, and therefore it was the duty of the Judge to tell the jury what was the proper construction of the deed as matter of law, and when the case came before the Court it was the proper duty of the Court to decide on the construction of the deeds, and to enter the verdict according to that construction.

There is nothing here that makes the maxim as to a grant being taken most strongly against the grantor at all applicable. There may be inaccuracy without ambiguity, and when the rejection of the words of surplusage will prevent all ambiguity, they may be rejected: *Wigram* on Extrinsic Evidence (2). That is so here. The deeds here, if properly examined, shew that it was impossible that the boundary line could be drawn from any one spot except the north-eastern corner of *Vincent's* house, and the map referred to shews that to be the starting point of the line. The inaccurate description of the position of that house may be rejected, and then there will be nothing which can require evidence, or introduce any matter of fact so as to make the decision depend on the finding of the jury.

The *Solicitor-General* replied—

THE LORD CHANCELLOR (Lord *Cranworth*):—

My Lords, this was was an appeal under the *Common Law Procedure Act*, 1854, upon a case stated by the parties according to the directions of that Act. The question arises in this way: A gentleman of the name of *Lyle* was the grantee or lessee of the *West Basset Mine*, in *Cornwall*, he had the right to work it. The Defendants were occupiers of a mine immediately south of the *West Basset Mine*, called the *South Wheal Frances Mine*; and the complaint of the Plaintiff was, that the Defendants, the occupiers of this *South Wheal Frances Mine*, had been guilty of a trespass in working beyond their northern boundary into the mine of the Plaintiff. On the trial at the assizes the jury found for the Plain-

(1) 8 H. L. C. 172. (2) Par. 203, p. 175.

tiff, leave being reserved to set aside the verdict and to enter a verdict for the Defendants, if the Court should be of opinion that the evidence did not warrant such a finding. Eventually the case came before the Exchequer Chamber, where it was held that, upon the evidence, it was not competent for the jury to find for the Plaintiff, and that consequently the verdict ought to be entered for the Defendants. The question is, whether that decision is right.

The question for the jury was, whether the *locus in quo* upon which the mine had been worked by the Defendants was parcel of the mine of which a sett was granted to the Appellant in 1852. Parcel or no parcel, is a question for the jury, and it was properly left to them. But the Judge was bound to explain to the jurymen, for their guidance, what was the true construction of any documents necessary for the decision of the question "parcel or no parcel."

In this case the dispute arose between two conterminous grantees. The Plaintiff was grantee of a mine in the north, the Defendants of a mine to the south. The Defendants had worked at the north of their mine; and the question was, whether they had gone beyond the boundary line which divided their mine from that of the Plaintiff. The boundary line of the Plaintiff, which separates it from the mine of the Defendants to the south, is described in the sett made to him in 1852.

It was the duty of the Judge to decide what was the true meaning of the language there used for describing the boundary line. But in order to adapt the description, contained in a lease or other instrument, of a boundary line (whether expressed by words or by a diagram), to the line in nature meant to be designated by the description, it is necessary to have recourse to parol evidence. The description in the deed cannot otherwise be identified with the thing intended to be described. In this case, therefore, parol evidence was properly admitted for the purpose of shewing whether the place in which the trespass complained of was committed, was or was not included in the sett of the Plaintiff.

We have no information as to what the direction was which the Judge gave to the jury, but the case was left on the terms that, if the jurors should find for the Plaintiff, and if, according to the evidence, they were bound to find for the Defendants, then the

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verdict should be so entered. The jury found for the Plaintiff, but the Court of Exchequer Chamber has decided that on the evidence the verdict ought to have been found for the Defendants; and whether the Court was right in that decision is what we have to determine.

The whole question turns on what is the true boundary line between the two mines. In the Plaintiff's sett of 1852 his southern boundary is described as "a straight line of about 355 fathoms from *John Vincent's* house, at the south-west extremity of the sett, to a bound-stone at the north-west extremity of *South Wheal Basset Sett.*"

It was the duty of the Court to interpret these words for the guidance of the jury. But, of their meaning, aided by proof of the facts that there is, near the south-west extremity of the Plaintiff's sett, a house called *John Vincent's* house, and that there is at the north-west extremity of *South Wheal Basset Sett* a bound-stone, there can be no doubt. The boundary line which the jurors were bound to take as that indicated in the Plaintiff's sett, was a line from *John Vincent's* house to the bound-stone in question. This, however, does not make the exact line clear. The bound-stone may, for practical purposes, be treated as a mere point, but this cannot be said of *John Vincent's* house, the depth of which from north to south is shewn by the evidence to be twenty or twenty-five feet. It is obvious, therefore, that the line, if drawn from the north-east corner of the house, will give to the Plaintiff a less quantity of mine than if drawn from the south-east corner.

The question, therefore, whether the triangular space included between two lines drawn from the bound-stone, one to the north-east, the other to the south-east corner of *John Vincent's* house, being the *locus in quo*, was or was not parcel of the mines included in the Plaintiff's sett, cannot be solved by mere interpretation of the language of the sett of 1852; for that language is equally consistent with a line drawn from the north-east as with a line drawn from the south-east corner of the house. The jurors, therefore, even supposing them to have received from the Judge a proper interpretation of the language of the sett of 1852, and to have acted on it, were yet obliged, in deciding the question of parcel or no parcel, to have recourse to farther evidence.

The evidence offered consisted, *inter alia*, of a prior sett, in the year 1835, of the same mine as that which was granted to the Plaintiff in 1852; and secondly, of two setts, in 1843, of the mines now worked by the Defendants, and which, as I have already stated, adjoin on the Plaintiff's mine; the southern boundary of the latter constituting the northern boundary of the former. In the sett of 1835, the language used in designating the boundaries may be taken as being identical with that afterwards used in the sett of 1852, save only that on the back of the sett of 1835 there is a map descriptive of the premises included in it, and the description of the parcels is followed by these words, "which said premises are particularly described by the map on the back of this sett."

It was the duty of the Judge to explain to the jury the true meaning of this deed, just as it was of the deed of 1852; and in construing this deed of 1835 the Judge, or, according to the liberty reserved at the trial, the Court, was bound to look at the map as forming part of the deed. Now, on the map the boundary line is clearly drawn from the north-east corner of *John Vincent's* house; and the Judge, or the Court, was bound to treat this as if, in the description of the parcels, the language had been, not a line from *John Vincent's* house, but a line from the north-east corner of *John Vincent's* house. This shews that the *locus in quo* was not included in the sett of 1835; but if not included in the sett of 1835, it could not be included in that of 1852, for in the sett of 1843, under which the Defendants derive title, their northern boundary is clearly made to be the same as to the southern boundary of the Plaintiff's sett established in 1835.

The result is, that it is immaterial to consider what was the boundary line intended to be drawn in 1852; for even if it had been expressly designated as a line drawn from the south-east corner of the house, that would not have warranted a finding that the *locus in quo* was part of the Plaintiff's sett.

Lady *Basset* had already, in 1843, granted to those under whom the Defendants claim title, a right to take all minerals south of the line adopted in 1835, *i.e.* south of a line from the north-eastern corner of *John Vincent's* house; therefore she had no power to grant to the Plaintiff, in 1852, that which she had already

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granted to the Defendants, or to those under whom they derive title.

Great reliance was placed on the fact that the map, on which so much depends, was shewn to be very inaccurate. *John Vincent's* house is placed on the map from forty to sixty fathoms more to the west, and considerably more to the south, than its true position would warrant. So, again, the bound-stone appears, by the map, to be on the hedge or bank running along the south side of the road to *Carnkie,* whereas it is, in fact, in the middle of that road. These inaccuracies, however, appear to me to be unimportant. The map is referred to not for the purpose of shewing the site either of the house or the bound-stone. The facts as to the true position of the house and the bound-stone are ascertained by other means. The use of the map is to clear up what, without it, was uncertain, namely, from what part of the house the line was to be drawn; and for that purpose its exact site is immaterial. The map is undoubtedly drawn on a very small scale, and if, from that circumstance, or from any other cause, it could be considered as doubtful to what part of the house the line was drawn, the view I have taken might have been different; but the plan, though on a small scale, clearly indicates, that wherever *John Vincent's* house was situate the boundary line was to be drawn from its north-eastern corner.

Translating, so to say, the map into words, it is as if the description had been, "the boundary to the south is a line drawn from the north-east corner of *John Vincent's* house, which is situate sixty fathoms to the west of the southernmost point of the road," whereas, in fact, the house is situate within five fathoms of that point. This inaccuracy would not, as I think, have been material. The boundary line would still be a line drawn from the north-east extremity of the house, wherever situate, assuming, of course, that the jurors were satisfied that the house really existing is that which was referred to in the deed. The circumstance that its locality was erroneously described would not affect the description of the boundary line, namely, that it was to be a line drawn from its north-east corner. When once the jurors were satisfied that the house known as *John Vincent's* house is that referred to in the deed, the error in the description of its locality is no more material

than if there had been an error in describing it as brick-built instead of stone-built, or as a house of three storeys instead of two. No error is material which would not prevent the jury from being satisfied that the existing house is the house referred to in the deed.

I have treated it as clear, as did the Exchequer Chamber, that the boundary line on the map is drawn in a straight line from the bound-stone to the north-east corner of the house, and that the existing house, called *John Vincent's* house, is that referred to in the map of 1835. Strictly these were both questions of fact. It was for the jurors to say, looking at the map, to what part of the spot there designated *John Vincent's* house the boundary line was drawn; but it is so plainly drawn to the north-east corner that this has always been assumed as a fact, so that if this precise point had been put as a question to the jury, it must and would have been so found.

So, again, it was the duty of the Judge to ask whether the evidence satisfied the jury that the actual existing house, called *John Vincent's* house, is the house intended to be described on the map. In deciding this the jurymen would have to consider, on the one hand, the fact that there is no other house known by that name, and, on the other hand, to remember the erroneous position of the house on the plan. Mere error of position on the plan cannot of itself be decisive. If the house itself had been five miles off, the jury would, of course, have come to the conclusion that such a house could not have been what was meant to be designated. If, on the other hand, the house drawn on the plan was only one yard out of its proper place, the jury would disregard such an inaccuracy. In fact, it is misplaced by about one hundred or one hundred and twenty yards to the west, by ten or twenty to the south.

It was for the jury, in these circumstances, to say whether the actual house was or was not that intended in the sett and map of 1835 as forming one terminus of the boundary. Assuming, as we must assume, the jury to have been satisfied that, in spite of the error in its position on the map, the house as it exists on the land is the house intended, and that the line on the plan is drawn from the north-east corner of the house, it was the duty of the Judge to

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tell the jurymen, as matter of law, that the boundary line is the line drawn from the north-east corner of the actual house to the bound-stone.

The Court of Exchequer Chamber has assumed, and, I think, very reasonably assumed, that on these two questions of fact the jury must be considered to have found, first, that the line on the plan is drawn to the north-east corner of what is there called *John Vincent's* house; and, secondly, that the actual house called *John Vincent's* house is that referred to in the map and description under the name of *John Vincent's* house. Assuming this to be so, it follows, as matter of law, having regard also to the sett of 1843, that the *locus in quo* could not form part of the sett of 1852.

On these grounds I have come to the conclusion that the judgment of the Exchequer Chamber was right, and so that the judgment of your Lordships ought to be for the Respondents, and that the appeal should be dismissed with costs.

LORD CHELMSFORD:—

My Lords, the action upon which the judgment appealed from was pronounced, was brought by the Plaintiff, the Appellant, for a trespass by the Defendants upon his mine, called *West Basset Mine*, and for taking away copper and other ore; and the sole question to be tried was whether the *locus in quo* was part of the Plaintiff's mine.

The Plaintiff claimed under a lease from Lady *Basset*, dated the 28th of February, 1852, in which the mine was described to be bounded on the south (the only part of the description of the boundaries necessary to be noticed), by "a straight line of about 355 fathoms from *John Vincent's* house at the south-west of the sett to a bound-stone at the north-west extremity of *South Wheal Basset Sett*."

At the trial, in *Cornwall*, the Plaintiff, after putting in the lease of the 28th of February, 1852, called witnesses to prove that the line from *John Vincent's* house, mentioned in the lease, ought to be taken from the south side, or from about the centre of that house. In the course of the evidence there was produced a former lease of the same mine, dated the 24th of March, 1835, which con-

tained the same description of the boundaries as in the lease of 1852, and was similar to it in all respects, except that it contained a reference to a map in these words, "which said premises are particularly delineated by the map on the back of this sett." In this map the line described as the boundary on the south clearly appears to be drawn from the north-east corner of *John Vincent's* house to the boundary-stone.

Evidence was given on both sides to shew that the situation of *John Vincent's* house was incorrectly described upon this map. Both sets of witnesses agreed that it was placed upon the line too far to the west, but they differed as to the extent of the error in this respect. The Appellant, by his evidence, shewed that *Vincent's* house was placed on the map too far to the south, while in the evidence of the Respondents it was stated that if *Vincent's* house was plotted in on the plan on the *Wheal Haste Sett* in its right place, the whole of the house would be to the south of the boundary line there shewn. The Respondents put in evidence two leases from Lady *Basset*, both dated the 17th of May, 1843, under which they held, one of which was a lease of the estate of *Grylles*, and in that there was the description of the boundaries, a description which included the *locus in quo*.

The whole case was left to the jury, and a verdict was found to the effect that "the southern boundary of the Plaintiff's mine should be a line drawn from the south-east corner of *John Vincent's* house to a bound-stone at the north-west extremity of *South Wheal Basset Sett*."

The Defendants, in the following term, obtained in the Queen's Bench a rule to shew cause why the verdict should not be set aside, and a verdict entered for the Defendants instead thereof, or why there should not be a new trial, on the ground that the verdict was against the evidence.

Upon this rule being called on for argument, it was ordered to stand over till after the decision of a case of *Reynolds* v. *Buckley and Others*, which was an action of trespass between other parties interested in the same mines, in which an appeal to the Court of Exchequer Chamber was pending. There is no statement in the printed case before the House of the particulars of this case of *Reynolds* v. *Buckley and Others*, nor any explanation given of the

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way in which it was supposed that the decision in that case would influence the judgment of the Court of Queen's Bench. But all that we are informed about it is, that, after the decision of that case in the Exchequer Chamber, the Court of Queen's Bench ordered that "so much of the rule as sought to enter a verdict for the Defendants, or reduce the damages, should be discharged, and that so much of the rule as prayed for a new trial should be suspended until the decision of the Court of Exchequer Chamber on this appeal, and that in the event of this Court not entering the verdict for the Defendant, the verdict obtained in the cause should be set aside, and a new trial had between the parties upon payment of costs."

Notice of appeal was given by the present Respondents, and, pursuant to the provisions of the *Common Law Procedure Act*, 1854, a case was stated between the parties, and the question for the opinion of the Exchequer Chamber was, whether the judgment of the Court of Queen's Bench, in discharging so much of the rule as was discharged, ought to be affirmed or reversed; or, in other words, whether the verdict given for the Plaintiffs ought not to be set aside, and a verdict entered for the Defendants.

This question, which has now been brought by appeal to this House, depends entirely upon what should have been the direction of the Judge to the jurymen upon the trial—whether he should not have told them that the southern boundary of the mine was a line drawn from the north-east corner of *John Vincent's* house, instead of leaving it to them to say from what part of the house that line ought to be drawn.

I have had great difficulty in making up my mind whether, upon the whole evidence, the proper line of the southern boundary was matter of fact for the jury, or was a question for the Judge, upon the documents produced. After careful consideration of the whole case, and having had the advantage of reading the opinion of my noble and learned friend on the woolsack, I agree in the conclusion at which he has arrived.

The question to be decided was: What was the boundary intended to be described in the lease to the Plaintiff, of 1852? Lord Chief Justice *Erle*, in delivering judgment in the Exchequer Chamber, said that "if the case stood upon that lease, it was very

likely that the Plaintiff would be entitled to succeed." I shall have occasion presently to consider whether, looking at the question as one of judicial construction of this deed alone, the description of the boundary which it contains is not adverse to the Plaintiff's claim. But the lease of 1835, with the map annexed, was put in evidence by the Plaintiff, and the description of the boundaries, corresponding exactly with those in the lease of 1852. The line of the southern boundary is marked on the map as proceeding from the north-east corner of *John Vincent's* house.

If nothing more had been done than merely putting in this lease as explanatory of the boundaries in the lease of 1852, the question would have been one entirely for the Judge; but the Plaintiff, who had produced a lease and map which, upon the face of them, would have been destructive to his case, gave evidence to shew that the map was inaccurate as to the position of *John Vincent's* house, and therefore contended that this raised a latent ambiguity, and opened the question as to the part of the house from which the boundary line was to be drawn. It is inaccurate to call this mistake in the map the disclosure of an ambiguity. It is merely the proof of incorrectness in a certain particular, in respect of which it appears that the map is no longer to be relied upon. The only inaccuracy which was proved to exist in the map was in the position of *John Vincent's* house, which is placed more to the west and to the south than it ought to have been. But, whatever was its right position, there was nothing in the evidence to disturb the fact of the line being drawn from the north-east corner of the house, or to remove it from the face of the map as part of the deed, where it was within the sole province of the Judge as matter of construction. And upon considering closely the description of the boundaries in the lease of 1852, it appears to me materially to aid this construction; for when it is said that the mine is bounded on the south by a line from *John Vincent's* house, "at the south-west extremity of the sett," the proper construction of the words would seem to be a line from that part of the house which is nearest to the south-west extremity of one mine, and which, therefore, must be the north side of the other.

Assuming, therefore, all the facts proved at the trial, the question turned upon the description of the boundaries in the leases of

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1835 and 1832, and the Judge ought to have directed the jury that, whatever was the exact situation of *John Vincent's* house, the proper southern boundary line was from the north-east corner of the house. The Court of Exchequer Chamber has properly dealt with the case as one of judicial construction of written documents, and I agree with my noble and learned friend on the woolsack that the judgment ought to be affirmed.

LORD WESTBURY:—

My Lords, I am sorry to be obliged to differ from your Lordships. To render my opinion intelligible it is necessary to state concisely the manner in which the question has arisen.

The Plaintiff claimed the minerals in question under a sett or grant made in 1852. The Defendants insisted that the minerals were not included in the parcels of that sett, but were included, and, in effect, passed to the Defendants, under two prior setts made by the same grantor in the year 1843, which had not expired. These two setts were put in by the Defendants.

Anticipating this defence, the Plaintiff put in evidence at the trial an earlier sett, made by the same grantor in the year 1835, and which was in force at the date of the setts of 1843, for the purpose of proving that the minerals in question were included in the parcels of that sett of 1835, and did not therefore pass by the setts of 1843, nor were included in the parcels of those two setts. The parcels in the sett of 1835 were substantially the same as the parcels in the sett of 1852, with the exception of a map which is indorsed on the sett of 1835, and referred to in the description of the parcels.

The sett of 1835 was material on another ground, because in the parcels and place of the setts of 1843 the southern boundary line in the sett of 1835 is referred to as forming the northern boundary line of the setts of 1843.

The question, therefore, in effect, came to be: What was the south boundary line described in the sett of 1835? When the sett of 1835 had been put in by the Plaintiff the Defendants fastened upon it, and insisted that it appeared, by the map indorsed on the sett of 1835 (which, being referred to in the parcels, became part thereof), that the southern boundary of the

sett thereby granted was formed by a line drawn from the north-east corner of a house (the site of which is laid down in the map, and called *John Vincent's* house) to a certain bound-stone therein described. "We accept," said the Defendants, "the line from the north-east corner of *John Vincent's* house as our northern boundary, and it gives us the minerals in question."

To this the Plaintiff answered that the fact of the boundary line appearing on the map to run from the north-east corner of *John Vincent's* house is an accident resulting from the circumstance of the site of *John Vincent's* house being inaccurately laid down in that map, and he adduced evidence to correct the map by proving the true position of *John Vincent's* house, which, if substituted for the erroneous site in the map, would no longer leave the line to the bound-stone running from the north-east corner of the house.

This evidence was received subject to any question of law, and the jury found in favour of the Plaintiff, and that the southern boundary of the Plaintiff's sett was a line drawn from the south-east corner of *John Vincent's* house (that is, according to its true site) to the boundary-stone.

Before the Court in banco the Defendants insisted that parol evidence was not admissible to prove and correct the error in the map, or at all events not to alter or affect the position of the boundary line, which, whatever might be the true site of *John Vincent's* house, must, as the Defendants contend, be drawn from the north-east corner of it. It is admitted that the map must be treated as incorporated into, and forming part of, the parcels in the sett of 1835.

In my opinion the evidence was clearly admissible. Upon a question of parcel parol evidence is always received. The error here is latent, not being discovered until it is shewn by extrinsic evidence what was the true site of the house incorrectly laid down in the map, and in a question of the extent or correctness of the parcels in a deed (which are a description of external objects) parol evidence, for the purpose of ascertaining the thing so described or referred to, is admissible.

But then the Defendants contend that although evidence may be received for the purpose of correcting the error as to the site

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of *John Vincent's* house and proving its true position, yet that it leaves untouched the position in the map of the boundary line, which they contend is equivalent to a statement in words that the line is to be drawn from the north-east corner of *John Vincent's* house whatever may be its true site. This, they contend, is the material and important statement; and that the incorrect setting forth of the site of the house is immaterial, being merely *false demonstration.* But in this argument there is a false assumption.

There is no express statement in words in the sett of 1835, that the boundary line is to run from the north-east corner of *Vincent's* house; *that* is collected only from the fact of the boundary line, as delineated in the map, meeting the north-east corner of *John Vincent's* house, because that house is incorrectly laid down in the map. But so soon as it is admitted or proved that the site of the house is erroneously laid down, the relative position, on the map, of the house and boundary line is disturbed, and it become impossible to know from the map or the parcels (as written), whether the boundary line does or does not hit the north-east corner of *Vincent's* house according to its true locality. Whether it does or does not do so becomes a farther question of fact to be ascertained by evidence, and not by construction, and therefore for the jury, and not for the Court.

A map is a picture or representation of external objects with their relative positions, and if of two adjoining objects one is laid down incorrectly, the whole of the relative description of the two is incorrect. Suppose in a map of the two adjoining counties of *Surrey* and *Sussex*, that *Sussex* is laid down erroneously, and in the map the eastern boundary of *Surrey* is made to run northwards from the extreme north-eastern boundary of *Sussex*, and the position of *Sussex* is then rectified, would it not be absurd to suppose that the alleged eastern boundary of *Surrey* must remain.

The map here is not a statement that the southern boundary line is to run *from the north-east corner of* Vincent's *house in its actual true position, but from the north-east corner of that false site which is erroneously laid down.* There is no *independent* statement of the connexion of the boundary line with the house, but only with the site falsely attributed to the house. In short, the relative position of the boundary line and the house is part of the in-

correct description of the site of the house, and the consequence of that error. As soon as the position on a map of one object is proved to be wrong, the whole of the representation of the relative positions of adjoining objects becomes erroneous, and the map must in this respect be re-drawn according to the facts, which must be ascertained from evidence.

It is, no doubt, true, that the construction of written instruments is matter of law, and that when a written instrument is laid before jurymen they are bound to receive the interpretation of the effect of that instrument from the Judge.

But the question here is not of the interpretation of the deed itself, nor even of the construction of the description of the parcels, but of the inference to be derived from a map as to the relative position of two objects laid down as adjoining each other, where one is proved to be erroneously laid down. As soon as that proof was admitted it became obvious that the true position in nature of the thing erroneously laid down, and the true relative position of the adjoining objects, must both be ascertained by external evidence.

If I rightly understand the judgment of the Court below, and the opinions of my noble and learned friends, it is assumed that the map amounts to a statement that the boundary line is to run from the north-east corner of *John's Vincent's* house *wherever that house may be.* But, with great submission, there is no such statement. The map states only that the line runs from the north-east corner of the house *as there laid down.*

In any mode of regarding the case, even that adopted by my noble and learned friends, it appears to me that the whole question was one of fact, and not of law, and was for the jury, and not for the Court; and, therefore, that the rule, so far as it was sent from the Queen's Bench to the Exchequer Chamber, ought to have been discharged.

Judgment of the Court of Exchequer Chamber affirmed; and appeal dismissed with costs.

Lords' Journals, 22nd June, 1866.

Attorney for the Appellant: *John Finch.*
Attorney for the Respondent: *R. W. Childs.*

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W. B. MITCALFE . . . . . PLAINTIFF IN ERROR;

AND

W. S. HANSON . . . . . DEFENDANT IN ERROR.

Bankruptcy—Premium on policy—Liability to pay money on a contingency— 12 & 13 *Vict. c.* 106, *s.* 178.

A covenant to pay recurring premiums on a life policy is an absolute covenant, and does not constitute "a liability to pay money upon a contingency," within the meaning of the 178th section of 12 & 13 Vict. c. 106. The only contingency being that of the continuance of the life insured, it is an absolute covenant to pay, not upon, but until, the happening of a certain event, so that the contingency specified does not create, but puts an end to the liability (1).

The statute contemplated only one single liability arising upon one contingency, and that cannot apply to a liability to make periodical payments, nor is there any provision in the statute which gives such a liability the character of an annuity.

IN this case *Hanson* brought an action of covenant against *Mitcalfe* upon two indentures, by which *Mitcalfe* had assigned to *Hanson* two policies of insurance, effected on the life of *Mitcalfe*, the first for the sum of £700, and the second for the sum of £200. They were assigned to secure to *Hanson* the repayment of a sum of money borrowed by *Mitcalfe*, and each indenture contained covenants on the part of *Mitcalfe*, first to pay the annual premiums to the insurance company necessary to keep the policy on foot; and secondly, in the event of *Hanson* having to advance or pay any of these premiums, to repay him the same with interest. The first count of the declaration, after averment of performance by *Hanson*, alleged for breach that *Mitcalfe* did not pay the annual premiums, which, after making the said indenture, became payable for keeping the policy on foot, but neglected so to do; and though, after such neglect *Hanson* advanced the money in payment of the same, whereof *Mitcalfe* had notice, and *Hanson* duly demanded repayment of the same, yet *Mitcalfe* did not repay, &c. The second count related to the second policy, and stated the cause of action, and the breaches, in the same manner.

(1) See now 24 & 25 Vict. c. 134, s. 154.

Mitcalfe pleaded three pleas, the first and third of which are not necessary to be mentioned; and secondly, that before action he became bankrupt, within the meaning of the statutes, &c; and that the causes of action in the declaration mentioned accrued before he so became bankrupt. Issue was taken on these pleas, and the case came on for trial in June, 1863, before Mr. Justice *Crompton*, when it was proved that the two indentures were executed on the 5th of January and the 8th of May, 1849; and that on the 19th of October, 1854, *Mitcalfe* was adjudicated a bankrupt, and obtained his certificate on the 9th of November, 1855, under the provisions of the *Bankrupt Act* of 1849 (1); that subsequent to the bankruptcy several premiums had become due; and that *Mitcalfe* not having paid the same, *Hanson* paid them, in order to keep the policies on foot. On this evidence the learned Judge directed the jury that the bankruptcy and certificate did not discharge *Mitcalfe* from the covenant to pay the premiums under the first breach, but did discharge him under the second breach from the covenant to repay *Hanson* the money advanced, and the jury found accordingly. A bill of exceptions was tendered to this direction as to the claims under the first breach in each

(1) 12 & 13 Vict. c. 106. The 177th section, re-enacting the 56th section of 6 Geo. 4, c. 16, allows proof of a contingent debt.

The 178th section, on which the question in this case arises, is in these words, "If any trader who shall have become bankrupt after the commencement of this Act, shall have contracted, before the filing of a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not proveable under any other provision of this Act, the person with whom such liability has been contracted shall be admitted to claim for such sum as the Court shall think fit; and after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors; and, so far as practicable, as if the contingency had happened, and the demand had been ascertained before the filing of such petition, but not disturbing former dividends: Provided such person had not, at the time such liability was contracted, notice of any act of bankruptcy by such bankrupt committed: Provided also, that when any such claim shall not have, either in whole or in part, been converted into a proof within six months after the filing of such petition, it may, upon the application of the assignees, at any time after the expiration of such time, and if the Court shall think fit, be expunged, either in whole or in part, from the proceedings."

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of the counts. The Court of Exchequer Chamber adopted the decision in *Warburg* v. *Tucker* (1), and held the direction to be right. This proceeding in error was then brought.

Mr. *Manisty*, Q.C., and Mr. *J. Brown*, Q.C., for the Appellant:—

The bankruptcy and certificate of *Mitcalfe* discharged him from the first as well as the second cause of action, and afforded a complete answer to both the breaches in the declaration. The 56th section of the 6 Geo. 4, c. 16, gave to a person to whom was due a "*debt* payable upon a contingency which shall not have happened before the issuing of the commission" power to apply to the commissioners to set a value upon the debt, and to permit him to prove the amount ascertained; and if the value should not be ascertained before the contingency happened, then the creditor, after the contingency had happened, was to be allowed to prove "in respect of such debt." On that statute various decisions occurred. In the *South Staffordshire Railway Company* v. *Burnside* (2) a liability to calls was held not to constitute a contingent debt; so was, in *Hankin* v. *Bennett* (3), a liability to pay costs; but in the judgment in that case (delivered after the passing of the 12 & 13 Vict. c. 106), it was suggested that the new statute had enabled any one, in such a case, to prove for a "liability to pay money on a contingency." In *Toppin* v. *Field* (4) a liability to pay premiums of insurance was treated, under the 6 Geo. 4, c. 16, as not constituting a contingent debt; but in the case of *Re Willis* (5), a liability on a guarantie to pay for some wool for which a bill of exchange had been given, had been held, in the Court of Exchequer, proveable; and when that case came before Vice-Chancellor *Knight Bruce* (6) he adopted the ruling of the Exchequer, though he had two years before, in *Ex parte Meyer* (7), held that a surety under a bond for payment of a debt by instalments could not prove against the original debtor and another person who had entered into a counter security to indemnify him. On giving this decision, however, he expressly stated that he acted against his own opinion under the pressure of authority. To meet the difficulty which had thus been thrown in the

(1) E. B. & E. 914, 4 Jur. N.S. 1142
(2) 5 Ex. 19.
(3) 8 Ex. 107.
(4) 4 Q. B. 386.
(5) 4 Ex. 530.
(6) 6 De G. M. & G. 771.
(7) 6 De G. M. & G. 775.

way of a particular class of creditors the 12 & 13 Vict. c. 106, was passed, and the question is, whether it has effected that object. The decisions on it have not been uniform. In *Warburg* v. *Tucker* (1) it was held that a covenant to pay premiums on a policy on life, and to repay the covenantee if he should pay them, did not constitute a debt payable on a contingency under section 177 (which was a re-enactment of the 56th section of the 4 Geo. 4, c. 16), nor a liability proveable under the 178th section of the 12 & 13 Vict. c. 106, and that judgment was in substance affirmed in the Exchequer Chamber (2). The present case was decided on that authority. This decision cannot be supported. In *Warburg* v. *Tucker* (1) the action was brought under these circumstances: *A.* owed money to *B.*; to secure the debt *A.* assigned three policies of insurance on lives, and covenanted, first, to pay the premiums as they fell due; and, secondly, if he omitted to do so, and the Plaintiff paid them, then to reimburse the Plaintiff. The declaration alleged this covenant, and assigned breaches. The Defendant pleaded to the whole declaration his bankruptcy and certificate, averring that they had occurred after the execution of the deed. The Court, on demurrer, held that the plea was no answer to the action either under the 177th or the 178th section of 12 & 13 Vict. But in *Young* v. *Winter* (3) the Court of Common Pleas had, but a week before the decision in the Queen's Bench, decided differently on one of these points. There the Plaintiff had guaranteed payment of a sum of money by the Defendant; to secure the repayment the Defendant assigned a life policy, with a covenant to pay the premiums, or to reimburse the Plaintiff if he paid them. The bankruptcy and certificate of the Defendant were set up in answer to the action, but the Court of Common Pleas held that the certificate did not discharge the Defendants from liability to pay the premiums, but that it did discharge him from liability to reimburse the Plaintiff the premiums which the Plaintiff had paid. The two decisions were, therefore, in conflict on one point. These cases of *Young* v. *Winter* (3) and *Warburg* v. *Tucker* (1), came before the Lords Justices in *Ex parte Barwis* (4). There a covenant had been given by sureties that the principal debtor would pay a debt of an ascer-

(1) 5 E. & B. 384; 1 Jur. N. S. 871.
(2) E. B. & E. 914; 4 Jur. N. S. 1142.
(3) 16 C. B. 401; 1 Jur. N. S. 960.
(4) 6 De G. M. & G. 762; 2 Jur. N. S. 5.

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tained amount by three yearly instalments. The principal debtor became bankrupt after the first, and before the second instalment, and it was held that this was the case of a contingent liability, and was properly the subject of a claim under the 178th section. In that case Lord Justice *Turner*, referring to these conflicting cases, expresses his preference for the decision in *Young* v. *Winter* (1). The mistake of the Judges in *Warburg* v. *Tucker* (2) seems to have arisen from their viewing the money sought to be recovered, not in the light of a money demand, an existing debt or an existing liability, but as a mere claim of damages. It was not so,—the amount was an ascertained amount, and the covenant was to pay that ascertained amount. The liability to pay was therefore clear, and it was a liability to pay on a contingency. The present case must be governed by the principle adopted in *Ex parte Barwis*, but the facts here are even stronger than in that case, for here there are no sureties interposed, but the covenant is between the bankrupt and the Plaintiff, who would be directly injured by non-payment of the premiums, and injured to the amount of the sums secured by the policies, and therefore he had a direct right to prove this as a contingent liability under the 178th section.

There is really no distinction between the covenant to pay to the office, and to repay to the Plaintiff—it is but one contingency, the happening of the day for payment of the premiums. [LORD WESTBURY:—One contingency to occur from time to time? How could the Court fix the value?] As in the case of an annuity provided for under the 175th section of the 12 & 13 Vict. c. 106.

Mr. *Macnamara* (Mr. *Holl* was with him), for the Defendant in error:—

This was not a case contemplated by the statute. It is a liability to pay successive sums till two or more contingencies shall happen. The Legislature intended only to provide for the case of a contingency with respect to an ascertained debt, or a liability the value of which could be fixed at the moment. A liability, such as the statute had in view, was one which is the result of an absolute obligation to pay. That does not exist here. The non-payment of the premiums may happen from time to time, or may never

(1) 6 De G. M. & G. 770; 2 Jur. N.S. 816.

(2) 5 E. & B. 384; E. B. & E. 914. 1 Jur. N.S. 8 Hil. Ter. 1142

happen at all, or may happen at one time and not at another. What is the liability arising on such a state of things? It is a mere liability to damages in case of occasioning injury by not making the payment. Such a liability is not within the words of the statute. In *Maples* v. *Pepper* (1), a tenant from year to year of two adjoining houses obtained from his landlord permission to make a communication between them on condition to restore them, at the end of the tenancy, to their original state. In April, 1855, the tenant became bankrupt, and, in May, gave notice of his intention to surrender the premises under the 12 & 13 Vict. c. 106, s. 145, the assignees having declined to take them. The Court held that the damages, resulting from a non-compliance with the condition, did not constitute a liability to pay money upon a contingency within the 178th section, and that the condition to restore was not a condition within the 145th section of the statute. That case was referred to in *Warburg* v. *Tucker*, in the Exchequer Chamber, and the Judges agreed that it was a liability on a contingency, but not a liability to pay money on a contingency, that it was a liability which resulted in damages, and that that was not within the statute. The distinction there recognised is shewn in *Adkins* v. *Farrington* (2). In that case *V.* and his two sureties, the Plaintiff and Defendant, gave a joint and several promissory note to *H.* for goods supplied to *V.* The note was payable on the 1st of January, 1858. In December, 1857, the Defendant became bankrupt, and obtained his certificate. The Plaintiff paid the note when due, and sought to recover contribution from the Defendant. The Court held that the Plaintiff had a right to claim, and to prove against the estate of the Defendant in respect of his liability to contribution, as "a liability to pay money on a contingency," within the 178th section of the statute, and, consequently, that the bankruptcy and certificate were an answer to the action. There the obligation of the Defendant to pay the money was direct and immediate. It is not so here. *Parker* v. *Ince* (3) is a converse illustration of the same principle. That was the case of a covenant to pay money during the separation of husband and wife, and the bankruptcy and certificate were there held to be no bar, because there was a succession of payments, which might vary in

(1) 18 C. B. 177. (2) 5 H. & N. 586. (3) 4 H. & N. 53.

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amount, which were to be made on several contingencies, and which, therefore, could not, under the provisions of the *Bankrupt Act*, be made the subject of proof. The covenant to pay was not a grant of an annuity under the 175th, nor a debt under the 177th, nor a liability under the 178th section, but was a mere liability to pay damages. *Ex parte Barwis* (1), is different from the present case, because there an actual debt existed, and the sum claimed was a clear and settled instalment of that debt. A contingency to pay according to the terms of a covenant, does not constitute a covenant to pay a debt on a contingency, or a liability to pay money on a contingency. It must be a covenant to pay an existing debt, or a liability which, on the contingency happening, becomes a debt, not a liability which, if not discharged will sound only in damages: *Fletcher* v. *Turk* (2). In *The General Discount Co.* v. *Stokes* (3), there were shares in a joint stock company held by the Defendant; he became bankrupt, and obtained his certificate in November, 1860. A call was made in July, 1861. The liability in respect of the call not being a liability at the time of filing the petition, it was held not to be the case of a liability to pay money on a contingency within the 178th section.

Mr. *Manisty* replied.

June 22. THE LORD CHANCELLOR (Lord *Cranworth*):—

My Lords, this is a writ of error from a judgment of the Court of Exchequer Chamber, in an action brought by the Defendant in Error against *Mitcalfe*, for breach of covenant. The Defendant covenanted during his life to keep up two policies of insurance. He neglected to do so. This action was brought for a breach of covenant. And the question is, whether or not the Plaintiff is barred of his action upon the covenant by reason of the 178th clause of the *Bankrupt Act*.

The clause is a long one. It provides that a contingent liability may, in certain circumstances there mentioned, be proved in bankruptcy, and, consequently, that an action on such a claim would be barred. But I am of opinion that in this case judgment ought to be given for the Defendant in Error, on the short, but all suffi-

(1) 6 De G. M. & G. 762. (2) 13 L. J. (Q. B.) 43. (3) 17 C. B. (N.S.) 765.

cient, ground, that the liability of the Plaintiff in Error under his covenant was not a contingent liability within the 178th section of the 12 & 13 Vict. c. 106. The Plaintiff in Error covenanted with the Defendant in Error that he would, during his life, from time to time, duly pay the annual premiums becoming due on a certain policy of insurance. This he omitted to do. The liability to which he exposed himself by entering into this covenant was absolute, except so far as it is made contingent by the fact that the annual payments cease to be payable at his death.

During his life the liability of the Defendant to make the annual payments is absolute. I agree with *Warburg* v. *Tucker* that this is not a liability to pay money on a contingency within the meaning of the 178th section of the Act. The contingency there contemplated is a contingency the happening of which will create an obligation to pay. The only contingency in this case is the contingency of the Defendant being alive on the days on which he has covenanted to pay the premiums. This is an absolute liability to make periodical payments during the whole of his life. The contingency is not that which creates the liability, but that which may possibly defeat it.

That this is no subtle or refined distinction seems to me apparent from the provisions of the Act. They are directed to the case of a liability, and I incline to think of a single liability, arising on a contingency, and for meeting such a case the provisions of the Acts are made, if not efficient, yet as nearly so as in the nature of things is possible. But they are inapplicable to the present case. The remedy given to the creditor is to make a claim for such sum as the Court may think fit. That must mean such a sum as the Court shall think to be the fair extent of the liability supposing there was no contingency; and then, if the contingency should happen within a limited time, the creditor may turn his claim into a proof, and receive dividends, as if his demand had been absolute, and not contingent.

But such a course of proceeding is not applicable to periodical payments which are to cease on the death of the person who is bound to make them.

In order to bring such a case within the statute, the party sought to be charged must be treated as having incurred, as to

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every annual premium, a liability contingent on his being alive at the time when, by the terms of his contract, the payment is to be made. There is no power, it will be observed, to enable the creditor to make a claim for the aggregate value of all the payments, *i.e.*, to treat his demand substantially as one in the nature of an annuity, or as if there had been only one contingency. The contingency, if contingency it can be called, is different in the case of every succeeding annual payment, *i.e.*, the contingency of the debtor being then alive. For such a case the statute does not appear to have made any provision. The decision, first, of the Court of Queen's Bench, and then of the Exchequer Chamber, in *Warburg* v. *Tucker* (1), from which this in substance is an appeal, seems to me to have been perfectly correct.

I should have come to this decision even if the *Bankrupt Act* of 1861 had never passed. But the fact that in that statute there is a clause expressly directed to meet the present case is strongly confirmatory of the view I have taken.

No doubt the Legislature may have mistaken the law as to the effect of the former statute. But the introduction of the 154th section into the recent Act is strong to shew the view taken by the framers of it. I think, therefore, that in this case there ought to be judgment for the Defendant in Error.

LORD CHELMSFORD:—

My Lords, I agree with my noble and learned friend, that a covenant to pay the annual premiums on a policy of insurance to keep it on foot, is not "a liability to pay money on a contingency" within the 178th section of the 12 & 13 Vict. c. 106. Even assuming that a covenant to pay the premiums during the life of the assured can be treated as a liability depending upon the contingency of the continuance of the life, yet the Legislature in this section seems to have in view only a liability to pay money on one contingency, and not to intend to provide for a succession of liabilities arising on successive contingencies, which in such a covenant as this may be annually recurring.

I agree also with my noble and learned friend in thinking that this is not at all the case of a contingent liability. The covenant

(1) 5 E. & B. 384; E. B. & E. 914.

is to pay the premium as long as the life continues. It is not a covenant to pay if a certain event happens, but until a certain event happens. It is an absolute covenant to pay as long as the life lasts. The contingency (if any) is the death of the assured, and then the liability to pay ceases.

But supposing that this covenant created a liability on a contingency, and that there was no objection on the ground of its not being a liability upon a single contingency, how can it be a covenant for payment of money within the 178th section? That section enables the person with whom a liability to the payment of money upon a contingency has been contracted, to claim for such sum as the Court shall think fit, and to convert that claim into a proof. There is no liability under the covenant in question to pay money either to or for the covenantee. It is rather like a covenant to do an act, viz., to keep up the policy by paying the premiums. Can it be said that the covenantor is liable to pay the premiums? Liable to whom? Supposing he chose not to pay them, who could compel him? An action might be brought by the covenantee, and damages obtained, but this would not be upon a liability to pay money, which, if it existed, would be directly enforceable by him, but upon an undertaking which created a distinct and different liability, viz., in case of non-payment of the premiums to be answerable in damages for the breach of covenant. I think, therefore, that the judgment ought to be affirmed.

LORD WESTBURY:—

My Lords, I entirely agree in the conclusion to which your Lordships have come in this case. It is perfectly true that when the Bill or Act of 1861 was in course of preparation this question was much considered, and a clause (1) was added to the Act providing for the occurrence of such questions in future. But although that may be regarded as a declaration of the opinion of the Legislature, it would not be conclusive with reference to the claim put forward by the Appellant in this case.

In the course of the argument reference was made to two sections of the Act of 1849—with regard to one of which it was suggested that by possibility these premiums might be regarded as annuities,

(1) Sect. 154.

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and that the party entitled to benefit by them might be regarded as an annuity creditor. Upon an examination of the section to which reference was made, namely, the 175th section, I think it is impossible to hold, without doing great violence to the language, that the covenantee, here entitled to the benefit of the covenant, can be regarded as coming within the description of an annuity creditor. Those words in the statute undoubtedly mean a party entitled to the benefit of an annuity granted by the person who afterwards becomes bankrupt.

So also with regard to the next section, viz., that providing for contingent debts; it has been well settled, and cannot now be disturbed (although one may regret the confined interpretation put on the word "debt"), that the right of action under a covenant of this description cannot be regarded in law as amounting to a right to a debt payable on a contingency.

These things were regarded as settled at the time of the passing of the Act of 1849, and the Legislature appears then to have endeavoured to provide for liabilities payable on a contingency, but whether the section does or does not include the present case, must depend entirely on the consideration whether the machinery introduced by that section can be made applicable to the case before us, so as to admit of proof being brought forward under it.

Now I decline to give any opinion on the question whether the claim under this covenant is not a liability to pay money on a contingency; but, assuming it to be so, it is quite clear that the 178th section was intended to apply, and does, in terms, apply only to a demand of that description, which is truly ascertained upon some specified contingency. And the provisions introduced by the Legislature were, that the Court shall set aside a sum upon some estimate that is to be made of the contingency, and which sum shall be a reserve fund to answer the proof that might be made upon the happening of the contingency. The words clearly refer to one proof and to one demand alone, because they direct that if the contingency shall happen after the bankruptcy, the person with whom the liability has been contracted shall be admitted to claim, and if the contingency has happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand. Now here it is quite

clear, that if you refer these directions to the present case, you might have the administration of the bankrupt estate kept open during the whole of the man's life, during twenty, thirty, or forty years, for the covenant being to pay the premium during the life of the person insured, the consequence would be that it would be the bounden duty of the Court to reserve a fund during the whole period to answer the premiums that might become due during the whole period of the life, and then those premiums *de anno in annum*, during the indefinite period of time, would be made the subject of proof. Now it is impossible that that could be the meaning of the Act of Parliament, because at the end of the section, in order to limit the possibility of inconvenience, there is a proviso introduced, that where a claim, either in whole or in part, shall not have been converted into a proof within six months after the filing of the Petition, it may, on the application of the assignees, if the Court shall think fit, be expunged. It is clear, therefore, that even if we were, by a violent construction of the words, to apply this clause to the case that has happened, possibly the application of it would produce no benefit at all, for supposing the bankruptcy to occur within a month after the premium has been paid, then, under a return to be made under the direction of the Commissioner, application might be made by the assignees to expunge the claim altogether within six months. That would be four or five months anterior to the time when the next premium would become due and payable. I think, therefore, it is clear, from the language of the clause of the statute, and from the nature of the machinery provided, that it is impossible to conceive that the Legislature had in its contemplation any such case as the present, that the words are inadequate and the machinery inapplicable, and that, consequently, the bankrupt law, as it existed at the time when this question arose, had not in view any contingent claim of this kind.

I concur, therefore, in thinking that the decree should be affirmed.

Judgment for the Defendant in Error, with costs.

Lords' Journals, 22nd June, 1866.

Attorneys for Plaintiff in Error: *Hillyer & Fenwick.*
Attorney for Defendant in Error: *Ilderton.*

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May 11, 14, 15, 17; *July* 13.

THE PROPRIETORS OF THE STAFFORDSHIRE AND WORCESTERSHIRE CANAL NAVIGATION . . . . . } APPELLANTS;

AND

THE PROPRIETORS OF THE BIRMINGHAM CANAL NAVIGATIONS . . . . . } RESPONDENTS.

5 C.B. 702.
6 Q.B. 579.
17 C.B. 553.
8 Jur. (N.S.) 630
834 634.

Canal—Water—User—Grant—Prescription—2 & 3 Will. 4, *c.* 71, *s.* 2.

The *S. & W. Canal* was formed under an Act of Parliament. Two years afterwards, another Act passed authorizing the formation of the *B. Canal*. This latter Act contained provisions requiring the *B. Company* to make a "communication" between the *B.* and the *S. & W. Canals* at *A.*, and gave the *S. & W. Company* power to make this communication if the *B. Company* should not make it within a given time. It was made by the *S. & W. Company* under an agreement executed between the two companies, which appointed commissioners for the purpose. As then formed, the communication was effected by twenty locks. Some years afterwards, the *B. Company* improved the communication and saved much water by substituting, at one particular spot, two locks for one. A consolidating Act was passed (5 Will. 4, c. xxxiv.), which contained in the 15th section provisions enabling the *B. Company*, the proprietors of several canals, to "raise the water of the canals from one level to another," by reservoirs and machinery, &c. The 83rd section, with a view to preserve the communication at *A.*, forbad the *B. Company* to use water from or out of the *W.* level (which was the highest level of the *B. Company*—the communication at *A.* being 132 feet below it) for any purpose whatever, when the depth of water in the lowest lock of the *B.* communication should stand at less than three feet perpendicular, to be reckoned from the sill of an upper gate in the *S. & W. Canal* adjoining thereto, and in case of breach of this prohibition, and consequent injury to the *S. & W. Company*, directed that any damages sustained should be assessed by a jury. The 258th section prohibited the *B. Company* from doing anything to obstruct the navigation of the *S. & W. Canal*, or, "in any wise to shorten or vary all or any of the *B. Company's* canals, so as thereby to impede the navigation of the *S. & W. Canal*," without the consent of the *S. & W. Company*. By the interpretation clause the word "canal," was to include "communications." The *B. Company* recently proposed to construct machinery which should pump back some of the water coming from the *W.* level, and so would affect the supply to the *S. & W. Canal*, but would not prevent the existence and free use of the communication at *A.* The *S. & W. Company* filed a bill to prevent the construction of this machinery, alleging that it was contrary to the intention of the Legislature as shewn in the various Acts, and to the deed of arrangement; and also contrary to the right which must now be taken as vested in the *S. & W. Company* by user and prescription:—

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Held, affirming the decision of the Lords Justices, that the bill must be dismissed. *Held*, also, that the powers granted by the Acts were granted for specific purposes, which were those of making and maintaining a free communication between different places by navigable canals; and that the ordinary doctrines as to the permissive use of water did not apply in such a case, and that no grant could be made by the *B. Company* of the use of any water which might injuriously affect those purposes. That consequently no right by prescription could, in this case, have any foundation in grant.

Nor could any prescriptive right by user be founded on the fact that the *B. Company* had, for many years, allowed the water to pass out of the *B. Canal* in a particular manner, so as to prevent the *B. Company* from afterwards improving its machinery and economising the water, for the water so passing into the *S. & W. Canal* did not constitute a stream or watercourse within the meaning of the *Prescription Act*, 2 & 3 Will. 4, c. 71:

And *held*, that the object of the communication being fully secured, the proposed works were not an impeding or obstructing of the *S. & W. Canal* such as was prohibited by the Act.

IN the year 1766 certain persons (of whom the Appellants, the Plaintiffs in the original suit, were the successors) were incorporated by an Act (6 Geo. 3, c. xcvii.) for the purpose of making and maintaining a navigable canal from the *Severn*, between *Bewdley* and *Titton Brook*, in the county of *Worcester*, to cross the *Trent*, near *Heywood Mill*, in the county of *Stafford*, and to communicate with a canal intended to be made between the *Trent* and the *Mersey*. The Act recited the advantages to be obtained for the communications between the interior parts of the kingdom, and gave powers to make and maintain the canal "from the *Severn* to or near *Autherley*, otherwise *Aldersley*, near *Wolverhampton*, and then to cross the *Trent* near *Heywood Mill*," and to join and communicate with a navigable cut or canal intended to be made between the River *Trent*, near *Walden Ferry*, in the county of *Derby*, and the River *Mersey*, "according to the rules, orders, and directions" thereinafter expressed.

By an Act passed in 1768 (8 Geo. 3, c. xxxviii.), powers were given to certain persons therein named (now represented by the Respondents, the proprietors of the *Birmingham Canal Navigation*), to make and maintain a navigable cut or canal from *Birmingham* to *Bilston*, and "thence to *Autherley*, there to communicate with the canal now being made between the Rivers *Severn* and *Trent*," &c.

Bilston is a township of *Wolverhampton*, and the Appellants threatened opposition to the passing of this Act, whereupon the

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Respondents, in order to get the opposition withdrawn, consented to the extension of their canal to *Autherley;* and there was accordingly introduced into the bill a clause (84 of the Act), which enacted that in case the Respondents should not complete the intended navigation, so that it might, within six months next after it was finished to *Birmingham*, be made to communicate with the canal then being made between the *Trent* and *Severn*, at or near *Autherley* (the Appellants' canal), so as to make and effect a free, easy, and perfect communication between *Birmingham* and the said canal, it should be lawful for the Appellants to complete such navigation, and the costs thereof should be settled by certain commissioners, and should be repaid by the Respondents to the Appellants. This was actually done.

The Respondents did not complete their canal, so as to establish a communication with the Appellants' canal, within the six months limited for that purpose by the 84th section of their Act. The Appellants, in consequence of this delay, presented a petition to Parliament, praying for leave to bring in a bill to enable them to carry effectually into execution the Act for making the canal from *Birmingham* to *Bilston*, and thence to *Autherley*. This application to Parliament led to an arrangement between the companies, which was carried into effect by a deed of agreement of the 2nd of March, 1771, which, reciting the failure of the Respondents to complete their canal, and the petition of the Appellants to Parliament, appointed nine persons or commissioners, four on the part of the Respondents and five on the part of the Appellants, who were invested with "full and absolute power and authority forthwith to make, extend, continue, and perfect the said canal." This agreement did not appear to have been intended to make any alteration in the respective rights and liabilities of the two companies. The office of the persons appointed by the deed only appeared to be to complete "the canal of communication" according to the terms of the Act of Parliament.

The canal was finished, and the communication between the two canals made, in 1772, and the Respondents were bound, under their own Act, to maintain the communication thus completed.

The *Autherley Station* on the Appellants' canal, which is their highest level, and at which place the junction of the two canals

was ordered to take place, is 132 feet below the *Wolverhampton Station* on the Respondents' canal, and the communication has, therefore, always been maintained by means of a series of locks, amounting in number to twenty, to which, in 1791, another was added. The lowest of these, that which is nearest to the Appellants' canal, opens into a cut, about twenty-five yards in length, on a level with the Appellants' canal, and leading into it. This reduced the last fall from ten feet to four feet ten inches. No complaint appeared to have been made on this subject.

Other Acts were passed giving the Respondents power to make other canals, and ultimately all these Acts were consolidated by the 5 Will. 4, c. xxxiv. By sect. 15 of this Act, it was enacted that it should be lawful for the Respondents to supply the canal, reservoirs, and feeders, and every of them, with water from all and every the brooks, streams, waters, and watercourses from which the canal, reservoirs, and feeders, or any of them, were, immediately before the passing of the said Act, lawfully supplied, by virtue of the previously existing Acts, or of any contract or contracts entered into, or thereinafter to be entered into, for that purpose, and also from time to time to raise the water of the canals from one level to another, or to any reservoirs whereon the said several levels stood originally, and for any of the purposes aforesaid it should be lawful for the Respondents "to use such engines or other machinery as the Respondents should, from time to time, judge proper or necessary, the said Respondents making full satisfaction for all damages to be sustained by the owners or occupiers of, or other persons interested in, any lands, tenements, or hereditaments, mills, forges, watercourses, brooks, streams, or rivers, respectively, which should be taken, used, removed, diverted, or injured, in or by the execution of all or any of the powers thereby granted."

By sect. 83 it was enacted that it should not be lawful for the Respondents at any time thereafter, by any engine or other machine whatsoever then erected, or by any other means whatsoever, to draw down, or to raise or throw up, any water from or out of that part of the said canals which lead from or near *Oldbury*, in the county of *Salop*, to the town of *Wolverhampton* aforesaid, and commonly called or known by the name of the "*Wolverhampton*

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Level," for any purpose whatsoever, when the depth of water in the said *Wolverhampton Level* should stand less than three feet perpendicular, to be reckoned from the top of the sill of the upper gate of the lock on that end of the said level which was towards *Autherley*, in the parish of *Wolverhampton* aforesaid.

By sect. 258 it was enacted that nothing in the Act contained should take away, diminish, alter, or in any wise affect, any of the rights, privileges, powers, or authorities, vested in the Appellants, or authorize or empower the Respondents to obstruct the navigation of the Appellants' canal, or any part thereof, or to take away, lessen, alter, divert, or obstruct, any of the springs, brooks, streams, feeders, waters, or watercourses, which then were, or for the time should be, lawfully used for the purpose of the Appellants' navigation, in order to supply the same with water, or to dig, cut, get, remove, take, or carry away, either in the event of sudden damage, or for any other cause or purpose whatsoever, any earth, soil, clay, stone, rubbish, trees, roots of trees, beds of gravel or sand, or other materials or things whatsoever within the distance of twenty yards of the Appellants' canal navigation, or in any wise to shorten or vary all or any of the canals of the Respondents thereby established, so as thereby to impede the navigation of the Appellants' canal, without the consent of the Appellants, under their common seal, first had and obtained for that purpose."

In 1852 communications took place between the Appellants and the Respondents on the subject of a proposal by the latter to pump back the water that came down the *Autherley* locks instead of letting it flow into the Appellants' canal. They did not come to any agreement, and in February, 1864, formal notice was given by the Respondents of an intention so to pump back the water. The Appellants denied their right to do so, and gave notice of an intention to fill a bill in Chancery to prevent it. On the 9th of March, 1864, the Appellants filed their bill, which set forth the above facts, and prayed "that the Respondents might be restrained from depriving the Appellants by diversion or pumping, or otherwise, of all or any part of the water which then was passed by means of the *Wolverhampton Locks* from the *Wolverhampton Level* of the *Birmingham Canal Navigation*, into the canal of the Appellants at *Autherley Junction*, and from otherwise diverting the said water

from the course it then took, when discharged from the said locks; and from preventing the same from flowing or being discharged into the Appellants' canal, at its junction with the Respondents' canal at *Autherley* aforesaid," and for farther relief.

In April, 1864, the Respondents filed an answer, denying that the Appellants enjoyed the use of the water passing from the Respondents' canal by means of the *Wolverhampton Locks* to the Appellants' canal as of right.

Evidence was taken, and the cause came on for hearing before Vice-Chancellor *Stuart*, who, on the 14th of November, 1864, ordered a perpetual injunction against the Respondents according to the prayer of the bill.

This order was taken before the Lords Justices, who on the 20th of January, 1865, pronounced a judgment of reversal.

This was an appeal against that reversal.

The *Attorney-General* (Sir *R. Palmer*), and Mr. *Craig*, Q.C. (Mr. *Jolliffe* was with them), for the Appellants:—

The interpretation clause in the Acts includes in the word "canal" all the "communications." This communication, therefore, where the Respondents propose to erect their machinery for pumping back the water, is to be deemed part of the canal; and, as such, is under the protection of the general provision of the various Acts affecting these canals. If all these Acts are examined it will be seen that the Respondents have only a restricted and limited power conferred on them. The Legislature, when it authorized the Respondents to make their canal, required them to open a communication with the Appellants' canal at *Autherley*, and imposed on them duties with respect to what would be necessary for making and keeping that communication open, so as to be of real value to the public. The Respondents are forbidden "to vary" their own canals so as to impede the navigation of the Appellants' canal, except by the consent of the Appellants. This itself shews what was the general intention of the Legislature, an intention which was in numerous sections worked out with necessary details. [They referred to the terms of these sections.] The powers granted to the Respondents were such as were necessary to enable them to maintain their own navigations; but they were

(1) Reported 11 Jur. N.S. 71.

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subjected to conditions with regard to their dealings with other canals, which shewed that the Legislature did not intend to grant them purely exclusive rights, but only such rights as might tend to promote the general system of internal navigation. This purpose was recognised and enforced by the deed. It is clear that that object will be frustrated if the Respondents can be permitted to withdraw from the Appellants that supply of water which is required for making really serviceable that communication which the Legislature took such pains to establish.

Then again, even supposing that the provisions of the Act were insufficient to effect what must be taken as the plain intention of the Legislature, the long enjoyment of this supply of water has created a right on the part of the Appellants which the Respondents are not now at liberty to disturb. The 2 & 3 Will. 4, c. 71, s. 2, declares that any claim by prescription to any watercourse, or the use of any water, the property of any body corporate, shall, after enjoyment for the full period of forty years, be deemed absolute and indefeasible. The claim of the Appellants falls within this description, and cannot now be questioned. A grant might be presumed, if such a presumption was necessary, but it is not. *Tapling* v. *Jones* (1) declares that no presumption of a grant is now required to establish such a right. Enjoyment for a certain time is sufficient; and therefore a ruling in the *Rochdale Canal Company* v. *Radcliffe* (2), that such a grant would not have been legal, cannot affect this case. And, even as to that case, when it went into the Court of Chancery (3) on a motion for an injunction to restrain the millowners from continuing to use the water as before, Vice-Chancellor Lord *Cranworth* refused the injunction, on the ground that the canal proprietors had acquiesced for many years in such a use of the water by the millowners, and that acquiescence disentitled those proprietors to the interference of a Court of equity. [LORD WESTBURY:—The difficulty in your case is, that your use of the water is an accidental thing, merely resulting from the Respondents' working of their own locks.] That does not take the case out of the enactment, for a canal is a watercourse, though it is one artificially constructed. In the absence of special custom an artificial watercourse is not in law

(1) 11 H. L. C. 290. (2) 18 Q. B. 287. (3) 2 Sim. (N. S.) 78.

11 Jur. N.S. 309

distinguished from a natural one: *Magor* v. *Chadwick* (1). *Arkwright* v. *Gell* (2) is not in point, for there the original user was with notice that it might be discontinued. There was no such notice here. On the contrary, the flow of the water has been uniform and perpetual, and nothing was said to make it appear that it was to be deemed accidental or gratuitous till these works were contemplated. Nor is *Elwell* v. *The Proprietors of the Birmingham Canal Navigation* (3) adverse to the Appellants, for what the Defendants did there was declared in this House to be warranted by the very words of their Act. There are no words in any of the Respondents' Acts justifying what is proposed to be done here. The Acts here, indeed, shew that it was the intention of the Legislature to protect the Appellants against such works as are now proposed to be executed, for there is a clear and positive provision against the Respondents' shortening the communication, or varying their own canals so as to impede or obstruct the navigation of the Appellants.

Mr. *Bacon*, Q.C., and Mr. *E. E. Kay*, for the Respondents:—

The object of the Legislature was to keep open a free communication by canals between the various places on the lines of these canals. That object will not be frustrated in any manner by what the Respondents propose to do; nor is there any enactment which prevents them from thus pumping back the water and keeping their own canal everywhere in a state fit for use. The Respondents were bound to give the Appellants a water communication, no more; that communication they will still enjoy, and the pumping back of the water by the Respondents is only a prudent method of using the canal, which may perhaps affect the profits of the Appellants, but does not interrupt the communication. As long as that is kept open, there is not, in the Acts, any restraint on the general powers of the Respondents in the management of their canals. On the contrary, powers are expressly reserved to them to do what is necessary for the maintenance of the navigation. [LORD WESTBURY:—It is not so much a question of the right to the water as that of keeping the original construction of the locks unaltered.] That original construction was altered when the twenty-first lock

(1) 11 Ad. & E. 571. (2) 5 M. & W. 203. (3) 3 H. L. C. 812.

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was made. What was then done, had for its object the economising of the water, and the proposed works are designed for the same purpose. That is a lawful purpose, and nothing has occurred which deprives the Respondents of the right to carry it into effect. There is nothing to shew that the locks being once made they were never to be altered, nor can the prohibition to vary the canal be construed as assumed on the other side, for that would be to prevent the introduction into the construction of the locks of any scientific improvements. The Respondents may not vary the works so as to impede the navigation—they will not do so. They are bound to keep a certain depth of water for the purpose of floating the boats; but, that object being attained, the surplus water may be employed in the best manner for the general purposes of the canal. The very enactment that requires a depth of three feet of water, shews that that being kept, no more is required. There will still be that depth of water after the alterations proposed by the Respondents are made. The two companies have no common interest, except in preserving the communication, and that will be preserved.

The Respondents had no power to make a grant such as is wished to be relied on by the Appellants for the foundation of the user: *The Rochdale Canal Company* v. *Radcliffe* (1). The mere user, under the circumstances which exist here, can found no right to the supply of the water; and, therefore, that case, when in Chancery (2), is inapplicable. Where there is no special contract, the acts of two parties in a case of this kind must receive a reasonable construction: *Elliot* v. *The North Eastern Railway Company* (3). There was nothing here which constituted an enjoyment in the character of an easement; and consequently the mere enjoyment conferred no right by prescription: *Harbidge* v. *Warwick* (4). In *Arkwright* v. *Gell* (5), the real ground for refusing the millowner a right to the water, founded on alleged user, was that the supposed user originated in a particular employment of the water, not for his benefit, but for the convenience of the mine owners: *Wood* v. *Waud* (6), establishes that no action

(1) 18 Q. B. 287.
(2) 2 Sim. N. S. 78.
(3) 1 J. & H. 145; 10 H. L. C. 333.
(4) 3 Ex. 552; Gale on Easements, 264.
(5) 5 M. & W. 203.
(6) 3 Ex. 748.

6 Jur. N.S. 817. 9 L.T. 555

will lie for the diversion of an artificial watercourse where it is obvious that the enjoyment of it depends on temporary circumstances, and the interruption is by a person who stands in the nature of a grantor. *Greatrex* v. *Hayward* (1), was decided on the authority of these cases. So in *Magor* v. *Chadwick* (2), though, as the mine owners had allowed the brewer to have an undisturbed enjoyment for twenty years, he was held entitled to retain it, the Court indicated that a custom to resume original rights which appeared to have been abandoned, might be set up in answer to the action. In *Rawstron* v. *Taylor* (3), and in *Broadbent* v. *Ramsbotham* (4), the owner of the land was held entitled to divert the surface water which flowed over his land, even though his doing so affected the supply in a watercourse, the waters of which had for many years been used by other persons. In *Gaved* v. *Martin* (5) it was held that a person could not acquire by twenty years user a right to water which had an artificial origin from mining, and might, therefore, at any time be cut off by a change in the working of the mine. The principle there adopted exactly applies to the present case; the flow of the water here is casual and intermittent, not natural and permanent, and the Respondents are not bound so to work their canal, at their own inconvenience, as to insure to the Appellants for ever the use of this surplus water.

There was no Parliamentary contract—there has not been—there could not be any grant, and the purpose of the deed was merely to secure the establishment of the communication. Having answered that purpose, it cannot be applied to an entirely different object.

The *Attorney-General* replied.

THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, the question to be decided upon this appeal is one of some difficulty; but, after careful consideration of the Acts of Parliament relating to the two companies, parties to the suit, I have arrived at the conclusion that the Appellants were not entitled to the interposition of the Court of Chancery to prevent

(1) 8 Ex. 291.
(2) 11 Ad. & E. 571.
(3) 11 Ex. 369.
(4) Ibid. 602.
(5) 34 L. J. (C. P.) 353, 11 Jur. (N.S.) 1017

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the Respondents doing the acts which it was their intention to do. [His Lordship gave a summary of the Acts, and of the deed of arrangement, and then proceeded:—]

The mode in which the difference of level in the two canals was originally provided for was by a series of twenty locks upon the Respondents' canal, the lowest lock being about thirty yards from the Appellants' canal. When the lower gates of this lock are open the water in it is upon a level with the water in the Appellants' canal. Before 1791 an additional lock, nearest but one to the junction, was made by the Respondents. It was suggested, rather than asserted, that this new lock was made by arrangement between the two companies. Of this there is no proof one way or the other; but there can be no doubt that the Respondents had a right under their Act to construct locks, and "to do all such other matters and things which they should think necessary and convenient for the making, effecting, extending, preserving, improving, completing, and using their navigation," as might consist with the preservation and maintenance of the communication between the two canals.

The effect produced by the additional lock was to reduce the fall at the two lowest locks on the Respondents' canal; the fall at the lowest of all having been thus reduced from ten feet, to four feet ten inches.

There is a difference of level at the several locks in the Respondents' canal. The fall is greater at the nineteenth lock, and when the lock is open, more water flows from it than is required to fill the last lock, and the excess escapes, over weirs, into the canal of the Respondents below this lock, and thence into the Appellants' canal. The communication between the two canals has been kept up and continued, as before described, from the completion of the canal of communication down to the present time.

In 1835, an Act was passed, 5 Will. 4, c. xxxiv., "to consolidate and extend the powers and provisions of the several Acts relating to the *Birmingham Canal Navigations*." By the 15th section of this Act, the Respondents are empowered "from time to time to raise the water of the said canals from one level to another, or to any reservoirs." But a restriction is put upon this power by the 83rd section of the Act. That section prevents the

Respondents from drawing down, or raising, or throwing up, "any water from or out of the *Wolverhampton Level*, for any purpose whatever, when the depth of the water in the level shall stand less than three feet perpendicular," to be reckoned (as to the Appellants' canal) from the top of the sill of the upper gate of the lock at that end of the said level which is towards *Autherley*. And it enacts that in case the Respondents shall, at any time thereafter, draw down, or raise, or throw up, any water from or out of the *Wolverhampton Level* when the depth of water in the level shall stand less than three feet perpendicular, all the damages sustained by the Appellants shall be assessed by a jury.

Upon this section three things may be observed:—

1st. A depth of three feet of water of the *Wolverhampton Level* must have been considered necessary for the united purposes of the two canals, and, consequently, the Appellants have a right in the water of the Respondents to this extent.

2nd. Subject to the obligation of keeping up this depth of water at the *Wolverhampton Level*, the Respondents are entitled, under the 15th section of the Act, to deal with the water in their canal as they think expedient, provided they do not thereby interrupt the communication with the canal of the Appellants.

3rd. If any operations of the Respondents upon their own canal are calculated to reduce the depth of water at the *Wolverhampton Level* below three feet, the Appellants have no right to stop them by injunction; but if these operations, in fact, reduce the level below the required depth, and the Appellants sustain damage (arising probably from the obstruction of the communication with the canal), they are entitled to recover the amount of such damage.

It might happen that the lowering of the depth at the *Wolverhampton Level* would occasion no damage at all to the Appellants, but that their canal might work, in conjunction with the Respondents' canal, as freely as before, and, therefore, I cannot think that the 83rd section, providing a particular remedy for a particular case, intended to confine the Appellants to this remedy whenever the Respondents interrupted or impeded the communication between the two canals.

Great stress was laid by the Appellants upon the saving clause in the 258th section of the Act of 5 Will. 4.

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The Respondents say that the object of this provision is merely to prevent their varying their canals by shortening, and as a proof of it, they refer to the next section, the 259th, in which the same expressions are used with respect to the *Wyrley* and *Essington Canal*, which is at a higher level than the Respondents' canal, and which, therefore, cannot be affected merely by a variation in the quantity of water in the Respondents' canal. But it is needless to criticise, very nicely, the language of this section, because it is clear that the Legislature must have intended, at least, to prohibit any alteration of the Respondents' canal that would interrupt the "free, easy, and perfect communication" with the Appellants' canal, which it was one of the main objects of the Act of 8 Geo. 3, to establish and maintain.

If, therefore, the Respondents were to draw off or divert so much of the water from their own canal as to interrupt the continued communication with the Appellants' canal, whether it would be comprehended within the prohibition to vary their canal or not, it would so entirely defeat the object of the Legislature, that if threatened to be done, and proof given that if done this consequence would inevitably follow, an injunction ought to be granted to restrain them.

The question is, whether the Appellants have shewn that the intended operations of the Respondents would probably be attended with such a result.

It appears that, according to the present system of locks on the Respondents' canal, when a boat passes through those locks there is a loss of seven feet three inches of water, being equal to the contents of the nineteenth lock, that there is space enough to increase the number of locks so as to reduce the fall of each lock to two feet, whereby the loss of water by the passage of each boat would be only the contents of a lock of two feet. This depth of two feet in the lowest lock of the Respondents' canal, would be just so much above the level of the Appellants' canal, and would flow into it. If a reduction of the supply of water to the Appellants' canal to this extent would not impede the navigation of the Appellants' canal, any operations of the Respondents upon their own canal, producing a similar effect, would not be prevented. Although the Respondents propose to draw off into a heading a

portion of the water from the twenty-first lock, for the purpose of afterwards raising it to the summit level of their canal (as they are empowered to do under the 5 Will. 4), they will leave in this lock two feet in depth of water above the level of the Appellants' canal, by making the opening of the communication between the heading and the lock two feet above the level of the water in the Respondents' canal, consequently, when the twenty-first lock is used, this depth of water will be allowed to pass into the Appellants' canal.

The evidence, that this reduction of the depth of water in the locks will impede the communication between the two canals, does not appear to me to be of a very satisfactory description. [His Lordship went through it, and commented on it.] I am not at all satisfied that, if the Appellants receive out of the Respondents' canal a depth of two feet of water above their summit level, any such injurious effect will be produced; and the Appellants have no right, under the Act of 8 Geo. 3, to more than a continual supply of water sufficient to keep open the communication between the two canals.

But the Appellants contended that, although this may originally have been all they were entitled to under the Act of Parliament, yet that they have since acquired a right to the quantity of water discharged from the Respondents' locks into their canal by long user under the *Prescription Act.*

The 2nd section of that Act (2 & 3 Will. 4, c. 71) applies to a claim to the use of water, which may be lawfully made at the Common Law, by custom, prescription, or grant. Custom and prescription are here out of the question, and if the Respondents could not have granted the use of the water to the Appellants, the Act is wholly inapplicable; but the Respondents have not the water in their canal with an absolute power of dealing with it at their pleasure. When the canal was made, under the provisions of the Act of 8 Geo. 3, the public had a right to use it upon payments of tolls, and the Respondents were bound to keep and maintain the canal in an efficient state for the passage of the traffic along it. They could not bind themselves that, for all time to come, a certain quantity of water should be discharged from their canal into that of the Appellants, because it was impossible

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for them to know whether all the water beyond what was necessary to keep open the communication between the two canals would not be wanted for the purpose of their own canal. By a grant of the continual use of the quantity of water flowing from their canal into the canal of the Appellants, the Respondents would have fettered themselves in the exercise of the powers vested in them by the Act for extending, preserving, and improving their canal, for which the application of all the water beyond what was necessary for keeping up the communication between the two canals might have been essential.

To impose such a servitude upon the water in their canal as that contended for by the Appellants would have been *ultra vires* of the Respondents, and consequently length of user could never confer an indefeasible claim upon the Appellants under the *Prescription Act*, as no grant of the use of the water could have been lawfully made by the Respondents.

Besides, the Appellants' interest in the water of the Respondents' canal depends upon the Act of Parliament, the 8 Geo. 3, and is limited by it. Therefore, even assuming that the necessary supply of water to the Appellants' canal, by the opening of the last lock on the Respondents' canal, could be considered as "the use of the water," within the meaning of the 2nd section of the *Prescription Act*, it would still be a question whether, the Respondents not being bound to allow more than a sufficient quantity of water to pass to keep up the communication between the canals, and having for their own convenience allowed more than enough to pass for more than forty years, the surplus quantity could be said to be enjoyed by the Appellants "claiming right thereto." I have no doubt, even if a grant of the use of the water could have been made by the Respondents, that the discharge of any quantity of water beyond what was necessary for the communication might have been prevented at any time by the Respondents, and at no portion of the long period during which it has been suffered to pass uninterruptedly could it be regarded as enjoyed under a claim of right by the Appellants, or otherwise than as a permission to them to use the water, a permission which the Respondents might have withdrawn at pleasure.

For these reasons, my Lords, I think that neither under the

Canal Acts, nor under the *Prescription Act*, are the Appellants entitled to an injunction to prevent the intended works of the Respondents, and that the decree appealed from ought to be affirmed.

LORD CRANWORTH:—

My Lords, the question must be looked at as if the canal of communication had been made by the Respondents, and not by the joint committee appointed by the deed of the 2nd of March, 1771. For the object of that deed was only to secure the immediate completion, in an efficient manner, of what the *Birmingham Canal* proprietors were by their Act bound to complete—namely, a free and easy canal communication between the canal of the Respondents and that of the Appellants.

There is nothing in the Act itself giving to the Appellants a right to have water supplied to them from the *Birmingham Canal*. If, therefore, the original *Birmingham Canal* proprietors had, immediately after the passing of their Act, made a canal communication between the *Wolverhampton Level* and the *Autherley Junction* by means of the now existing locks, and with the same machinery for pumping back water which they now propose to set up, they would have done all which the Act made it their duty to do. The question therefore, so far as concerns the present dispute, is, whether by what has passed since the passing of the original Act of the 8 Geo. 3, c. 38, any new duties have been thrown on the Respondents, or any rights which they originally possessed have been taken from them.

The Appellants contend that whatever might have been their rights, and whatever might have been the duties of the Respondents at the time when these Acts became law, the Appellants have now acquired a right to receive, and the Respondents have incurred a corresponding obligation to supply, a lock full of water for every boat passing to or from the one canal into the other.

In support of this claim they rely, first, on clauses which are found in several Acts passed since that under which the Respondents derive their title; and, secondly, on long usage, ever since the canals were first formed. The first of these subsequent Acts, to which our attention was called, was the 23 Geo. 3, c. xcii., by which a company was formed for making a canal, communicating

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from the Respondents' canal, near *Birmingham*, to join the *Coventry Canal*, at or near *Fazeley*. By the 17th section of that Act provision was made preventing the *Birmingham Canal* proprietors from lowering the level of their canal below a certain fixed height at the *Wolverhampton Junction*. The canal of communication between the canal of the Respondents and that of the Appellants was fed by the water accumulated in the *Wolverhampton Pound*, being the highest level of the Respondents' canal, and being 132 feet above the *Autherley Junction*, which is the highest level of the Appellants' canal. It is very important to the Appellants to be made secure that the canal of communication should never become impassable for want of water; and this object would be effectually attained by preventing the Respondents from lowering the water at the *Wolverhampton Level* below a certain fixed depth. This is done by the clause in question, which goes on to provide that if the Respondents should at any time reduce the water at the spot in question below the stipulated level, and any damage should be thereby occasioned to the Appellants, then for such damage the Respondents should be responsible.

The Appellants contended that the damage there contemplated must include the damage which would arise from the loss of water which their canal would receive from the opening of the lowest lock on the canal of communication upon the passing of a boat from one canal to the other. But I cannot so interpret the Act. The only right which, up to the passing of this Act, had been guaranteed by the Legislature to the Appellants, was a free and easy canal communication between the *Autherley Junction* and the *Birmingham Canal* at *Wolverhampton*. If the Respondents should fail to keep up a sufficient head of water at the *Wolverhampton Level* there would be danger that this communication might be obstructed, and therefore, when by the *Fazeley Act* a new line of canal was connected with that of the Respondents, by which water might possibly be diverted from their canal, it was reasonable to take precautions that nothing should be done to prejudice the rights of the Appellants. This would be effectually accomplished by making it the duty of the Respondents to maintain a specified head of water at the *Wolverhampton Level*, and I can discover nothing to shew that anything beyond this was contemplated by

the clause in question. The *Fazeley Act* was passed only fifteen years after the 8 Geo. 3. It is therefore impossible that the Appellants could, in that short interval of time, have acquired any prescriptive right to the water; and by an Act passed in the year 1784, being the year next after that in which the *Fazeley Canal Act* was passed, the *Birmingham Canal Company* was united with the *Birmingham* and *Fazeley Company*, and they from that time became one and the same company.

The next Act referred to by the Appellants was the *Wyrley Canal Act*, passed in the year 1792. By that Act, a company was incorporated for making a canal from *Wyrley*, to communicate with the *Birmingham Canal* at or near *Wolverhampton*, and care was taken to prevent that new canal from injuring the *Birmingham Canal*, by abstracting any of its water. With that object, the 7th section provides that it should be lawful for the *Birmingham Canal Company* to prevent the passage of any boats from the one canal to the other, unless the water in the *Wyrley Canal* should at its junction be at least six inches higher than that of the *Birmingham Canal;* and by other clauses (9 and 10), provisions were made for securing the waste water of the new canal for the use of the *Birmingham Canal.* These provisions all shew an anxiety on the part of the *Birmingham Canal* proprietors to secure themselves against any diminution of their waters by the formation of the new canal; but I cannot see how they affected the relation subsisting between the *Birmingham Canal* proprietors and the Appellants; they seem to me to leave the relative rights and duties of the Appellants and the Respondents untouched.

Many other Acts having passed giving powers to the *Birmingham Canal Company* to make collateral cuts and canals, it was deemed expedient, in the year 1835, to consolidate them all, and this was accordingly done by an Act of 5 Will. 4, c. xxxiv., on some of the clauses of which the Appellants relied as supporting their view of the case. All the then existing Acts were thereby repealed, and the company was re-incorporated by its present name of "*The Company of Proprietors of the Birmingham Canal Navigations,*" and powers were given to the newly incorporated proprietors intended substantially to include all which they enjoyed under the repealed Acts. The Act expressly recognises the existence of

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different levels on the line of the *Birmingham Canal*, amongst them the *Wolverhampton Level*, being that from which the canal of communication is supplied. Power is given to the Respondents by the 15th section to raise water from one level to another, and for that purpose to use such engines or machinery as they should from time to time judge proper. This, if taken by itself, would seem to give to them authority to do what they are now proposing to do, but the 258th section expressly provides that nothing in the Act contained shall affect the rights of the Appellants' company, or empower the newly established company to obstruct the navigation of the Appellants' canal, or to divert any of the brooks, streams, feeders, waters, or watercourses which for the time being shall be lawfully taken or used by them for the purposes of their navigation.

Reliance was placed in argument on this clause by the Appellants, and I think they are right in saying that the clause must be taken to prevent the Respondents from setting up the 15th clause, as conferring on them any right, against the Appellants, enabling them to divert water which they did not already possess. But I cannot think it goes farther, and the question, therefore, still remains as before, what were the rights of the Appellants as to the water passing from the *Wolverhampton Level* to the *Autherley Junction.*

No other statutes were cited by the Appellants as bearing on the question; and those which they cited, and to which I have referred, do not seem to me to confer on them any rights whatever; and as I have already stated it to be my opinion that there was nothing in the original Act of the 8 Geo. 3, c. xxxviii., which gave them a right to any of the water passing along the canal of communication; the only remaining question is, whether by lapse of time or otherwise they have acquired rights not conferred on them by the Legislature.

I do not think they have shewn any such right. The water passing from the *Wolverhampton Level* to the *Autherley Junction* is not a natural, nor even artificial, stream in the sense in which those words are understood in the many cases in which the law relating to flowing water has been considered. The water in this canal is not flowing water. It is water accumulated under

the authority of the Legislature in what is in fact only a tank or reservoir, which the Respondents are bound to economise and use in a particular manner for the convenience of the public. It never flows. It is let down artificially for the convenience of persons wishing to pass with boats, by what may be called steps, till it reaches the *Autherley Level*, and so enables the boats to pass into the Appellants' canal. To such water none of the doctrines either as to natural or artificial streams, is applicable, and the only way in which the Appellants could have obtained a right to insist on having a lock full of water, at whatever depth, discharged into their canal, must be by express grant or covenant by the Respondents, giving to them such a right.

Of the existence of such a grant or covenant there is no trace whatever, and it cannot be presumed. To have entered into any such engagement would have been a clear breach of duty on the part of the Respondents. But even independently of that consideration arising out of the public parliamentary character of the Respondents, I do not think that the facts of this case would justify a jury in presuming a grant, even if the Respondents' canal had been private property subject to no statutable duty. Such presumptions are made when, without them, enjoyment long continued or acquiesced in cannot be reasonably accounted for. But here there is no occasion for any presumption whatever. The circumstances in evidence make it impossible to presume any contract, such as is contended for, to have been made at the original formation of the canal of communication, and when the line of locks had once been made, it was the interest no less of the Respondents than of the Appellants that the lowest lock should be opened from time to time to let the boats through, and this of necessity gave a supply of water to the Appellants. There is no reason for presuming any contract by, or obligation on the Respondents, because the transit of boats could not otherwise be affected.

On the whole, therefore, I am of opinion that the decree of the Lords Justices is perfectly right, and that this appeal ought to be dismissed with costs.

LORD WESTBURY:—

My Lords, the arguments of the Appellants may be arranged

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under three heads; first, contract as involved in, or resulting from, the statutory relation established between the two companies by the Act of the 8 Geo. 3, and the subsequent deed of arrangement; secondly, the effect of certain enactments in the Acts relating to the canals; and, thirdly, a prescriptive title resulting from long use and enjoyment.

The first subject, therefore, to be considered is the statutory relation between the two companies, and the deed of arrangement.

The Act incorporating the Appellants, and authorizing the construction of their canal, was first passed. This canal is throughout treated as an independent undertaking, and the Appellants are empowered to obtain water from their navigation from springs or streams mentioned in the Act, or which might be found in making the canal, or within 500 yards on either side of it. The canal is not treated as standing in need of any extensive supply. Two years afterwards another Act of Parliament, the 8 Geo. 3, was passed for incorporating and establishing the Respondents' company. The canal of the Respondents was to run from *Birmingham* to *Bilstone*, and thence to *Autherley*, there to join and be united with the canal of the Appellants, which, at the time of the passing of the last-mentioned Act, was in course of being made.

It is very material to weigh accurately the effect of the recitals and provisions in this second Act. The Legislature imposed on the Respondents the duty of making a canal of communication from *Bilstone* to *Autherley*, for the purpose of effecting a junction with the Appellants' canal, and thereby creating a continuous line of canal navigation, which is described as a work of great public utility. The Appellants are treated as having an interest in this canal of communication, and accordingly powers are given by the Act to allow the Appellants to construct the canal of communication if the Respondents should fail to do so within a limited time, and they are to be repaid the cost of such construction by the Respondents' company.

It is stated by the Appellants that the 84th section was probably inserted at their instance, but it contains nothing that affords ground to infer that the Appellants stipulated or expected that they would receive any supply of water for their own canal from or

by means of this canal of communication. The difference of level in the land traversed by the canal of communication (there being a considerable fall towards *Autherley*) rendered it necessary that this canal should be constructed with a series of locks, amounting originally to twenty, and afterwards increased to twenty-one in number. Having regard to the state of engineering science at the time of the construction of this canal, these locks were a necessity, and the only mode in which the canal could be made. They were constructed in the manner then used and approved. The locks, and the level of the ground, involved this consequence, that whenever a barge passed through these locks, either way, a certain quantity of water necessarily escaped from the canal of the Respondents and ran into the canal of the Appellants. Thus, the canal of communication, from the mode of the construction of its locks, in fact became a feeder of the canal of the Appellants.

It is now contended by the Appellants, and it forms the staple of their argument, that this consequence was foreseen, intended, and agreed on, and that consequently the construction of the locks cannot be altered or improved if the consequence be a loss of water material for the navigation of the Appellants. The Appellants insist that this mode of construction was adopted under the deed of arrangement, and that its inseparable accident, namely, a supply of water to the Appellants' navigation, must be considered as tacitly comprehended within the agreement between the parties as to the mode of construction. But I cannot find any trace of any such thing having been foreseen or intended either by the Legislature or the parties. The Appellants' project preceded that of the Respondents. The scheme of the Appellants' canal, with its water supply, and the means of measuring it, is complete in their own Act, which was passed two years before the Act of the Respondents, and does not contain any reference whatever to any such future undertaking as the Respondents' canal. The supply of water that has resulted from the locks that were constructed in making the canal of communication, is a contingent advantage that does not appear to me to have entered into the contemplation of the parties, and certainly was not the subject of any provision in the Acts of Parliament, or of any stipulation or agreement in the deed of arrangement. But some distinct provision or

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express stipulation was necessary to control and deprive the Respondents of the benefit of the express power given by their Act to do all such matters and things as they should deem necessary or convenient for preserving, improving, or using their navigation.

In the exercise of this power the Respondents are improving the construction of the locks on the canal of communication. What they have done or propose to do will not in the least degree impede the use of that canal, or interfere with its maintenance or preservation. The object is to economise the water of their own navigation. That which they are doing is within their powers, and is also dictated by their duty to their shareholders, and before they are deprived of the right of so acting, we must see clearly that the right is controlled by some contract or some statutory obligation.

In my opinion the locks in question might have been originally constructed by the committee under the deed of arrangement with the improvements now proposed by the Respondents, and if the Appellants at that time foresaw the benefit that would accrue to themselves from the plans which were then adopted (which I do not believe to have been the case) they ought to have secured this advantage by some stipulation sufficient to control the general power of improving their navigation, which is expressly given to the Respondents' company. It is impossible to infer from what was done an intention either in the Legislature or the parties to impose, through the medium of the plans adopted in the construction of the locks, a perpetual onerous servitude in the canal of the Respondents in favour of the undertaking of the Appellants.

Secondly, the Appellants insisted on certain enactments contained in the *Fazeley Canal Act* of the 23 Geo. 3, c. xcii., the *Wysley Canal Act* of the 32 Geo. 3, and to certain clauses in the *Consolidation Act* of the 5 Will. 4, c. xxxiv.

With respect to the *Fazeley Canal Act*, the enactment relied on by the Appellants is a provision restraining the Respondents from reducing the level of the water at the *Wolverhampton Pound* below a certain height. This was obviously required and intended for the purpose of securing sufficient water for the proper use of the communication, but cannot be regarded as a statutory recognition

of the right of the Appellants to the contingent supplies of water which their canal received as incidental to the ordinary working of the locks on the canal of communication. The provisions in the *Wyrley Canal Act* hardly seem to be material. They were intended to preserve from waste the water in the canal of the Respondents, but they recognise the fact of a loss of water attending the passage of barges from a higher to a lower level, and *vice versâ*.

The Appellants, under this head of their argument, lastly relied on the 258th section contained in the *General Consolidation Act* of the 5 & 6 Will. 4, c. xxxiv. This section is the general saving clause of the Act. It enacts that "nothing in the Act contained should take away, diminish, alter, or in anywise affect, any of the rights, privileges, powers, or authorities vested in the Appellants, or otherwise; or empower the Respondents to obstruct the navigation of the Appellants' canal, or any part thereof; or to take away, lessen, alter, divert, or obstruct, any of the springs, brooks, streams, feeders, waters, or watercourses, which then were, or for the time being should be lawfully taken or used for the purposes of the Appellants' navigation, in order to supply the same with water;" "or in anywise to shorten or vary all or any of the canals of the Respondents thereby established, so as thereby to impede the navigation of the Appellants' canal, without the consent of the Appellants under their common seal first had and obtained for that purpose."

It is not the business of a saving clause to confer any new right or power. Its object is to preserve existing rights and interests, and if the right claimed by the Appellants did not exist at the time of the passing of this Act (which in my opinion was the case), it can hardly be supposed that it was intended to create or confer any such right by this saving clause.

But if, as the fact is, and as the argument admits, the Respondents, at the passing of this *Consolidation Act*, had the right to alter and improve the construction of the locks on the canal of communication, it is not taken away by the prohibition to "obstruct the navigation of the Appellants' canal, or to take away, lessen, alter, divert, or obstruct any of the springs, streams, or waters which then were, or for the time being should be, law-

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fully taken or used for the purposes of the Appellants' navigation, in order to supply the same with water," words which are not applicable to the water in question, namely, water that has been allowed to escape into the canal of the Appellants through the imperfect construction of some of the locks on the canal of communication.

With respect to the last words of this 258th section, the argument of the Appellants was, that as the word "canal" is, by the interpretation clause, made to include communications, the alteration of the locks in question was a varying of the communications with the Appellants' canal; but the words so relied on are inapplicable to the thing done by the Respondents, for the improvement of the lockage on the canal of communication does not in any way affect or impair the efficiency of that canal, or the free, easy, and perfect communication with the canal of the Appellants.

It remains to consider the title claimed by the Appellants, as resulting from long user, under the *Prescription Act*. In my opinion it is a mistake to suppose that the second section of the *Prescription Act* is applicable to the circumstances of this case. There is no existing stream or body of water, either natural or artificial, the use of which has been, is, or can be, claimed by the Appellants. The water claimed is that portion of the water of the Respondents which, when the locks are used, from time to time escapes from the locks into the canal of the Appellants. This occasional escape or flow depends upon, and is occasioned by, the use of the locks as now constructed. Are the Respondents then compelled by law to continue a faulty and expensive construction of their locks in order that the Appellants may have the benefit of the waste? Have the Respondents lost the right of improving the machinery on their own land? The Appellants are, in reality, seeking from the Court a declaration to this effect; and it is hardly necessary to do more than state what is really the proposition of the Appellants in order to shew its absurdity.

But if the *Prescription Act* had been at all applicable it would be incumbent on the Appellants to prove that the right founded on the claim by user might, at the beginning of, or during that user, have been lawfully granted to them by the Respondents' company. No such proposition can be maintained. Had any

grant been made at any time by the Respondents' company of the right, now alleged by the Appellants to have been acquired against them by user, such grant would have been *ultra vires* and void, as amounting to a contract by the Respondents not to perform their duty by improving their navigation, and conducting their undertaking with economy and prudence.

In my judgment, my Lords, the case of the Appellants wholly fails, and I think the decree must be affirmed, and the appeal dismissed with costs.

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Decree appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 13th July, 1866.

Solicitors for the Appellants: *Bower, Son, & Cotton.*
Solicitors for the Respondents: *Bell, Steward, & Lloyd.*

MARGARET E. CHRISTIE AND OTHERS . . APPELLANTS;
AND
ELLIS DUNCOMBE GOSLING . . . . . RESPONDENT.

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Will—Vested interest—Tenant in tail—Personalty.

A testator devised his real and personal estates to trustees; he desired that his share in a banking business should be offered to his second nephew, and, in case of non-acceptance by him, to the brothers of that nephew, according to priority of birth. He directed his trustees to stand possessed of his estates for the use of the nephew, so accepting, for life, with remainder to the first and other sons of such accepting nephew in tail, and he bequeathed his personal property on the same trusts as were directed concerning his real estate, "or as near thereto as the rules of law and equity will permit:" he added a proviso that the personal estate should not vest absolutely in any tenant in tail unless such person should attain twenty-one. The nephew did accept, and died leaving a son, who became first tenant in tail, by purchase, of the real estates:—

Held, that, the bequest not being executory, the words "so near thereto as the rules of law and equity will permit," did not affect its construction.

Held, also (*diss.* Lord *St. Leonards*), that the gift of the personality was not one void for remoteness, as a gift to such tenant in tail who should live

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to attain twenty-one, but was a gift to tenants in tail by purchase only, and that the first person who bore the character of tenant in tail of the real estate by purchase, took an absolute interest in the personalty.

There being a difference of opinion in the Courts below, and in this House, the doubts having been raised by ambiguity in the words of the testator, the costs were ordered to come out of the estate.

THIS was an appeal against a decree of Lord Chancellor *Westbury* (1), by which a previous decree of the Master of the Rolls (2) had been reversed.

Bennett Gosling, of *Fleet Street*, banker, made his will on the 8th of March, 1844, and thereby appointed his two brothers, *Robert Gosling* and *Thomas George Gosling*, his executors. He directed that the right to succeed him as a partner in the banking house should be offered to his nephew, *Ellis Gosling*, the second son of his brother, *Robert Gosling*, and in case he should refuse, or neglect within a given time, to accept the offer, it should be made in succession to the other younger sons of *Robert Gosling* who should be born in his, the testator's, lifetime, or in due time after his decease. In case all should refuse he made other provisions for his share of the partnership. He then bequeathed a sum of £50,000 to his two cousins, *H. W. Gregg* and *J. C. Sharpe* (whom he named his trustees), upon trust to purchase in fee simple a mansion-house and premises, to hold the same, and to receive and accumulate the issues until some one of the persons named should accept the partnership. And in case any one of them should so accept, then to the use of the person so accepting, and his assigns, for and during his natural life, without impeachment for waste, with remainder to the use of the first and every other son and sons of the person so accepting severally and successively in the order, and according to the priority, of their respective births, and the heirs male of the body and respective bodies of such son and sons, every elder of such sons, and the heirs male of his body, being always preferred to, and to take before every younger of such sons, &c., with remainder to the use of each and every son of his said brother, *Robert Gosling*, born in the testator's lifetime, or in due time after his decease, subsequently to the one who should so accept, severally and successively as therein more particularly

(1) 1 De G. J. & S. 1.

(2) 32 Beav. 58.

mentioned; with remainders over. The trustees were to invest the rents and profits of the hereditaments, and to accumulate, &c., till the acceptance was declared. And the will then proceeded thus: "I give and bequeath unto my said trustees, &c., all my real estate, and all the residue of my personal estate, upon trust to sell my chambers in *Lincoln's Inn*, and to get in and convert into money all my said residuary personal estate, and to invest the money to arise from my said chambers and residuary personal estate, &c., and to stand possessed of all such investments and personal estate, and also to stand seised of all such real estate to such uses, upon such trusts, and for such estates and interests, and under, with, and subject to such powers and provisions as hereby are declared concerning the lands and hereditaments hereinbefore directed to be purchased, *or as near thereto as the rules of law and equity will permit:* Provided nevertheless, and I hereby declare, that *the said accumulations and personal estate shall not, nor shall any part thereof, vest absolutely in any tenant in tail unless such person shall attain the age of twenty-one years.*"

By a third codicil, made in October, 1851, the testator appointed his two brothers, in the places of his cousins, as his trustees, and recalled the bequest of £50,000, declaring that he had purchased an estate in *Surrey* in lieu thereof, and he appointed the so purchased estate to his trustees to hold upon and for the several uses, trusts, intents, and purposes, in his said will mentioned, as to the mansion, &c., intended to be purchased. The codicil concluded as follows: "It is my particular desire that no one shall be put in possession of my estate, or shall enjoy the rents, dividends, and profits of any part thereof, or of any property left by my will or codicils, until he shall attain the age of twenty-five years; and in the meantime the rents and profits to accumulate."

The testator died 12th of May, 1855, leaving his brother, *Robert Gosling*, his heir-at-law, and the Appellant and two other sisters, his next of kin, him surviving. At the time of his death *Ellis Gosling* (the second son of *Robert Gosling*) was under age, but he attained his full age on the 17th of January, 1857, and immediately afterwards accepted the offer contained in the testator's will.

Doubts having arisen as to the construction of the will, a Case

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(under the 13 & 14 Vict. c. 35) was stated for the opinion of the Court, and the following were the questions agreed on :—

First. "Whether the gifts contained in the will of the testator of his residuary personal estate, and the accumulations thereof, in favour of the sons and remoter issue male of the several persons by the said will made tenants for life of the lands and hereditaments by the will directed to be purchased (coupled with the proviso in the third codicil as to the postponement of the vesting of the said residuary personal estate, and the accumulations thereof) are void."

Second. "Whether the desire of the testator, expressed in the third codicil, with respect to the accumulation of the rents and profits of his estate and property, is operative, and whether such rent, dividends, and profits, or any of them, ought to be accumulated in accordance therewith?"

The case was heard before Vice-Chancellor *Wood*, and a question was raised whether there was not a postponement of the enjoyment of the annuity granted to *Ellis Gosling*, the first tenant for life, until he was twenty-five years of age.

In March, 1859, Vice-Chancellor *Wood*, on the hearing of the cause, made an Order declaring that "the desire of the testator expressed in the third codicil, with respect to the accumulation of the rents, dividends, and profits of his estate and property is inoperative" (1). *Ellis Gosling* was, therefore, held entitled to such accumulation as had arisen since he became twenty-one years of age.

Ellis Gosling, who had become of age on the 17th of January, 1857, died on the 26th of January, 1861, leaving only a daughter him surviving, but in a month afterwards the Respondent, *Ellis Duncombe Gosling*, was born, and became first tenant in tail male of the real estate devised by the will.

(1) His Honour said: "I find a plain and clear gift to the party on declaring his option and becoming a partner in the concern, of an interest for life in the property first directed to be purchased with the sum of £50,000, and then the residuary and personal estate is to be laid out in land, and is to be held on the same trusts as those which are contained in the previous limitation, making, therefore, the present Plaintiff tenant for life of the residue. As regards the Plaintiff, therefore, there is a clear and plain gift, only, with a limitation divesting the interest in a particular event." *Le Gosling v Gosling*, Johns 265. 5 Jur NS. 910, 911.

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On the 6th of May, 1861, *Ellis Duncombe Gosling*, the infant, by the Rev. *Edward Duncombe*, his next friend, filed his bill in Chancery, praying for a declaration of the trusts of the will, and for accounts, and for the appointment of a receiver. The cause came on for hearing before the Master of the Rolls, who, on the 11th of June, 1862, made an order, declaring that, subject to the life interest given to *Ellis Gosling*, the residuary personal estate and accumulations, during the minority of *Ellis Gosling*, were not disposed of by the will, and that so much of the accumulations as arose from the real estate of the testator devolved, upon the decease of *Ellis Gosling*, upon *Robert Gosling*, the heir-at-law of the testator, and that the residuary personal estate and such part of the accumulations as arose therefrom, devolved at the death of *Ellis Gosling* upon the next of kin of the testator living at the time of his death (1).

A petition for a rehearing was presented, and the cause was reheard before Lord Chancellor *Westbury*, who, on the 18th of November, 1862, made an Order, declaring that the trust contained in the will, as to the residuary personal estate, and the accumulations of the rents, dividends, and income of the real and residuary personal estate during the minority of *Ellis Gosling*, was valid in law, and that, by virtue thereof, the residuary personal estate, and the accumulations, vested absolutely in the Respondent, *Ellis Duncombe Gosling*, subject to being divested by his death under the age of twenty-one years (2).

Mr. *Rolt*, Q.C., and Mr. *C. Hall*, for the Appellants, the next of kin:—

The Courts below, though differing in the result, agreed in this, that the proviso was not to be severed from the body of the gift, but both were to be taken as forming part of one direction. If so, then the proviso is to be read as if the words immediately following the gift, and in the same sentence, were, "and so as that it shall not vest," &c. It is, in fact, a condition precedent, not a mere incident attached to the gift, and which may be entirely independent of the gift itself. The time of vesting being fixed as a condition, the person to take absolutely must shew, not only

(1) 32 Beav. 58, 9 Jur. N.S. 1048. (2) 1 De G. J. & S. 1, 9 Jur. N.S. 107.

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that he is the person intended, but that he has arrived at the age required, for unless he can do both these things the personal estate will not vest absolutely in him.

It is now admitted that the gift is not executory. Then, if there was no rule of law against perpetuities an interest would arise which would exist for a time, but would be divested upon the happening of a certain event. What is the meaning of the words "shall not vest absolutely," it is that the person to be benefited shall not take a transmissible interest. The Lord Chancellor himself stated reasons which seemed to prove that the limitation as to the personalty was void, for he shewed that there might be a person in existence who, though entitled to the rents and profits for a certain time, did not take a transmissible interest in them, but if he died before he was twenty-one, even though he left a child who succeeded, as tenant in tail, to the real estate, that child would not take the personal estate, for that the law did not allow a tenancy in tail in personalty. If, therefore, this Respondent, *Ellis Duncombe Gosling,* was to marry, and have a son, and then die under twenty-one, that son would be excluded from the enjoyment of the personalty, and the next person named in the limitations would take. And in the judgment it was said that the gift of the personal estate could not be extended, nor altered, by the words, "so far as the rules of law and equity will permit." Such a result, it is plain, would defeat the intention of the testator, who meant that the two properties should go together, and has tried to create a tenancy in tail in each, and has, by that very attempt done what the rules of law and equity will not permit.

The only way in which the Respondent can support this limitation, as in favour of himself, is by arguing that *Dungannon* v. *Smith* (1) was not well decided, or is inapplicable to the present case. He cannot sustain either of these propositions. The principle of that case is most clearly explained and applied in The Law of Property (2), namely, that "where the estate is so limited that it may vest in a person not born within the legal limit, the devise is altogether void." That is the case here. The object here was to make personalty and realty descend together as long as possible. This might have been done in favour of the first

(1) 12 Cl. & F. 546. (2) Ch. II. s. III., pp. 342—346.

tenant in tail of the real estate, subject to be divested on his dying under twenty-one, and then to his son in the same way (though the rules of law will not allow the gift of an estate tail in the personalty), but it must have been by a clear direction confining it to those who took the realty "as purchasers," and there is no such direction in this will. On the contrary, the gift appears to be made to a class of persons who take the real estate as tenants in tail, and the title of any one of them to the absolute possession of the personalty may never occur within the limits permitted by law. The gifts cannot be severed from each other, and as personalty cannot descend like realty, the gift of the personalty is void.

The practice of conveyancers has been founded on this difference, and is fully explained by Vice-Chancellor *Wood* in *Lord Scarsdale* v. *Curzon* (1). In *Wood's* Conveyancing (2) it is said that the form of the gift of the personalty should be to the child of the tenant for life, and so the bequest kept within the limits of perpetuity, or there should be used the more concise expression, "tenant in tail by purchase." The same rule is stated in some Practical Observations on Conveyancing, by Mr. *Butler*, and in *Davidson's* Conveyancing (3). In the Court below, *Powell* on Devises (4) was referred to for the purpose of shewing that in the old precedents of conveyancing such a form had not been adopted. But on that two things may be remarked: first, that the power there given to trustees related only to property to be purchased in future, and did not necessarily refer to the vesting of existing property; and next, that in a note to that very precedent the learned Editor remarks that it would not be unwise "to restrain the exercise of the power to the minority of such of the tenants in tail as should be *children of the tenant or tenants for life*, to the exclusion of more remote descendants, to prevent the possibility of any objection being raised to the power on the ground noticed by Lord *Eldon* in *Ware* v. *Polhill* (5), 'that it might travel through minorities for two centuries,' and, therefore, as obnoxious to the rule against perpetuities."

The rule of construction, in a case of this sort, is well settled.

(1) 1 J. & H. 40—63, 6 Jur. N.S. 209
(2) Ed. by Powell.
(3) Vol. iii, p. 495, 2nd Ed.
(4) Vol. i., p. 696—7. Ed. by Jarman.
(5) 11 Ves. 257.

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You must first ascertain the objects of the testator's bounty by construing his will without reference to the rules of law which prohibit limitations too remote; but, having done this, those rules of law must be then applied to see whether that object has been well carried into effect: *Cattlin* v. *Brown* (1). Adopting that principle of construction here, it is clear that the object has not been well carried into effect, and that the limitation as to the personalty is void.

Sir *R. Palmer*, Q.C., and Mr. *Wickens*, for the Respondent:—

The proper construction will be best discovered by examining the effect of the words in the order in which they occur. First, take the gift itself; secondly, the qualification, "as near as the rules of law and equity will permit;" and, thirdly, the proviso. As to the first, the gift is clear and absolute, and is not affected by anything that follows, nor can the gift be made to include limitations not permitted by the rules of law and equity. Nor is it touched by the decision of this House in *Dungannon* v. *Smith* (2), for one is a series of gifts, the other is only one single gift, and the one cannot be converted into the other. Take the description given of the case of *Dungannon* v. *Smith* in The Law of Property (3) already referred to, and it will be seen to be inapplicable here, for this is a case of a series of limitations, and not of a single gift to any unascertained member of a class. To apply the case of *Dungannon* v. *Smith* here could only be upon the principle that, because where there was no series of limitations you ought not to make one in order to defeat the intention of the testator, therefore, where there is a series of limitations you will destroy it, and so reverse the ordinary rule of construction, and make it *ut res magis pereat quam valeat*. What was that case? The testator gave leaseholds to trustees to permit his grandson to take the profits for life, and afterwards to permit the heir male by descent for the time being to take the profits, until some person taking the estate as heir male by descent should attain twenty-one, and then to convey to him. That was an event which might never happen, for there might never be an heir male who attained twenty-one. That

(1) 11 Hare, 375. (2) 12 Cl. & F. 546.
(3) Ch. II., s. III., p. 342.

was a single gift to some individual of a class. There was an entire suspension of the vesting as to the *corpus* of the personal estate till such a person should attain twenty-one. There was not a gift of any interest to him till then. An attempt was made in argument to divide it into a series of limitations to the person who, at the time of the testator's death, should be his heir-at-law, if such person should attain twenty-one, and then to the person who, when he died, should become heir-at-law. But this House held that the limitation could not be so divided, and would not turn a single gift into a series for the purpose of raising the objection of remoteness. The Respondent here may so far appeal to that case as to refer to that refusal, and to claim the benefit of it here in the exact converse application of it. The first son here, taking the real estate in tail under the limitations of the will, becomes the person described in the will as entitled to the personalty, and is entitled to it absolutely, subject only to its being divested if he should not live to attain twenty-one. If he should attain twenty-one, it then becomes his absolutely, subject no longer to be divested. Then as to the words, "as near as the rules of law and equity will permit." As this was not an executory devise the testator was, in this will, his own conveyancer, and declared what he intended should take effect. It has been contended that, in order to give effect to that intention, there must be introduced into the bequest of the personal estate words which would make the heirs of the body, who would take the real estate by descent, take the personalty "by purchase." There is no such necessity. If there was, that could only be subject to the qualification stated. Now, the issue of the tenant in tail do not, by force of the terms of the will, take the personalty, but take it because they are tenants in tail, as persons taking by title of law: *The Duke of Newcastle* v. *The Countess of Lincoln* (1). In that case there was a double trust to be executed by the Court; there was a covenant to settle personal property for such persons and such estates, "as far as the law would allow" (a phrase equivalent to the one used here), as were declared concerning real estates which were limited to the first and other sons in tail male, with several remainders over. The Court executed the settlement of the personal by analogy to that of the freehold estate,

(1) 3 Ves. 387, 398.

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but so that no child born, unless attaining twenty-one, should have a vested interest transmissible to his representatives. Here the testator was aware of the different rules of law applicable to realty and personalty, and he had no idea of attempting to violate them. What he desired was to unite the two properties, so far as was practicable. *Ellis Gosling* is here to be tenant for life of the real estate, and he is to be entitled as such to the personal estate. The remainder in the real estate is to the first son of *Ellis Gosling* in tail, and having that title, he is to take the personal estate, but with this qualification, that if he should die under twenty-one, his title to the personal estate would cease, and it would go over. There is no estate in the personalty given to the issue of *Ellis's* son, directly or impliedly; it is given, first, to *Ellis*, who is tenant for life, and, next, to his son who is tenant in tail of the realty, but they are not to take the personalty as tenant for life and as tenant in tail, for that would be contrary to the rules of law and equity. They are purchasers of the realty, though that expression is not used, and so take the personalty. The other side is in this dilemma: there is no gift of the personalty, except to the person who takes the realty by purchase, and so he takes the personalty as if by purchase, or, if there is such a gift, it is to him alone who takes, "so far as the rules of law and equity will permit." Either the gift is not made as contended, or it is made as modified by the application of those rules. The objection of remoteness, therefore, does not arise. In *Ware* v. *Polhill* (1) the rents of leasehold estates were bequeathed to trustees to pay them to persons entitled to the real estate in strict settlement, but power was given to the trustees, at any time, with the consent of the persons entitled, or at their own discretion, to sell the leaseholds, and invest the produce in real estates to the same uses. The power was held void, because the personalty vested absolutely in the tenant in tail upon his birth. There the gift to him was direct by force of the words of the will. The original words here give no interest in the personalty to any person who does not take the realty by purchase. If any other person is to take an interest in the personalty, it must be by implication from the words which follow. If any such implication is to be made, it must be limited by "the rules of law and equity," and,

(1) 11 Ves. 257.

therefore, cannot be carried to the point of remoteness; it must be confined to those who would take within the limits of those rules.

The foundation of this decree is, that nothing makes the gift to this Respondent void unless by means of this proviso, which applies to those who would otherwise take absolutely under the words of the will, and there is no such person except the tenant in tail of the real estate by purchase.

Mr. *C. Hall*, in reply:—

The testator meant to create a trust of the personalty for the first son of *Ellis Gosling*, and the heirs male of the body of that son, as he had created it with regard to the real estate, and he has exceeded the limits allowed by law.

Mr. *Selwyn*, Q.C., and Mr. *Rasch*, appeared for the executors, but took no part in the argument.

THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, the question in this case arises upon a bequest of personalty in the will of *Bennett Gosling*, after devises of his real estates to his nephews successively, and their first and other sons in tail. The clause upon which the question arises is in these terms: "I give unto my trustees, their heirs, &c., all my real estate, and all the residue of my personal estate, upon trust to sell, &c., and convert into money all my residuary personal estate, and to invest the moneys in their names in parliamentary stocks, &c., and to stand possessed of all such investments and personal estates, and also to stand seised of all such real estate to such uses, &c., as hereby are declared concerning the lands and hereditaments hereinbefore directed to be purchased, or as near thereto as the rules of law and equity will permit; provided nevertheless, that the accumulations and personal estate shall not, nor shall any part thereof, vest absolutely in any tenant in tail, unless such person shall attain the age of twenty-one years."

The question is, whether the proviso is a qualification of the preceding limitation, making it liable to be divested on the death of a tenant in tail under twenty-one, or whether it is a description of

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the person who is to take the personalty, being only a tenant in tail, attaining twenty-one. In the latter case the gift would be to a class, and as it might vest the estate in one who could not take, on account of the law against perpetuity, the bequest, according to the well-known authorities cited in the argument, would wholly fail. It is not contended that the trusts of the personal estate are executory; if they were, they could be moulded so as to carry out the intentions of the testator as far as the rules of law permit. But the bequest is a declaration, by the testator himself, of the trusts of the personal estate, and if he has expressed his intentions so as to offend against the law of perpetuity, the words, "as near thereto as the rules of law and equity will permit," in his reference to the trusts of the real estate, will not assist him.

The Master of the Rolls held that the attainment of twenty-one was just as much a condition precedent as the character of tenant in tail. He admitted that his decision would defeat the intention of the testator, and struggled with himself to reconcile the settled rules of construction with that intention. But if a clause in a will is susceptible of two constructions, one of which will support, and the other defeat, a testator's intention, there can be no doubt which of the two ought to be adopted. Now, it seems to me impossible to contend that the bequest of the personalty can only be construed so as to incorporate the proviso with the limitation, and make the whole one entire *descriptio personarum*.

The more natural mode of reading this clause, and one more apparently consonant with the testator's intention, appears to me to be, to take the referential limitation by itself, and then to graft the proviso upon it. The effect, then, would be to give the personal estate to the tenant for life of the real estate, and afterwards to his first son, by purchase, in tail. The son, being tenant in tail, would of course take the whole interest in the personalty; but the proviso, which applies only to the case of a tenant in tail, qualifies the bequest by a declaration that the personal estate shall not vest absolutely in any tenant in tail unless he should attain the age of twenty-one years. There is nothing forced or strained in construing this proviso as a mere qualification of the preceding limitation, which, having taken effect, is to cease on the event of the tenant in tail not attaining twenty-one.

This was the view of the clause taken by the Lord Chancellor *Westbury*, and upon which his decree proceeded; and I am of opinion that his decree ought to be affirmed.

LORD CRANWORTH :—

My Lords, I concur with my noble and learned friend on the woolsack in thinking that the decree of Lord Chancellor *Westbury* is right.

The gift of the personalty must be read with reference to the gift of the real estate; so read it is as follows:—I give my residuary personal estate to *Ellis Gosling* and his assigns for his life, without impeachment for waste, with remainder to the use of his first and every other son and sons, severally and successively, in order and according to priority of birth, and the heirs male of the body and respective bodies of such son and sons, every elder of such sons and the heirs male of his body being always preferred to and to take before every younger of such sons and the heirs male of his and their body and respective bodies," with remainders over. Stopping there, it is clear that at the death of *Ellis* in 1861, his infant son would take an absolute interest in the residuary personal estate. If the law allowed an entail to be created in personal estate, the infant would have taken only an estate in tail male. But that cannot be. Personal estate is not within the statute *de donis;* and it is certain that, if there had been nothing in the will beyond what I have cited or referred to, the infant would, immediately on the death of his father, have obtained an absolute and indefeasible interest in the residuary personal estate.

But a difficulty arises from the proviso, which is found immediately after the gift of the residuary personal estate, which gift is made by reference to the previous gift of the realty.

That proviso, it was argued, is not to be read as a proviso defeating a previously vested estate, but as a superadded description of the person who is to take the estate under the previous words of gift. So reading it, the gift, it was argued, is too remote; for, if the infant should die under the age of twenty-one, leaving a son, that son would be one of the objects of the testator's bounty under the general designation of tenant in tail male, and would, on attaining twenty-one, become absolutely entitled to the personalty.

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If this be the proper mode of understanding the clause, there is no doubt that the gift is too remote; for the property might not vest till the son of a person born after the testator's death had attained his age of twenty-one years; and it is obvious that, following up the same reasoning, the vesting might be suspended much longer—indeed, indefinitely.

I do not feel the force of this reasoning. The question is, what meaning we ought to give to the words "*tenant in tail*," in the proviso. The Appellants' argument assumes that they must be taken to mean any person answering the description of heir male of the body of the sons of *Ellis*, successively. I do not think this is their meaning. If there had been no such proviso, it would have been impossible to contend that there was any gift to the issue of any son of *Ellis*. But for the proviso, any son of *Ellis* would, on his birth, though taking an estate which, by reference to the limitations of the real estate, is described as an estate to him and the heirs male of his body, have become absolutely entitled to the personalty. No issue of the son would have had any interest whatever. This being so, I think that it would be a forced and unreasonable construction of the will to read the words "*tenant in tail*" found in the proviso as referring to any class of persons to whom nothing had been previously given. The object was to restrict and narrow the class who, but for the proviso, would have taken absolutely, not to let in any class of persons, who, if there had been no proviso, would have taken nothing.

For these reasons I think that the decree of Lord Chancellor *Westbury* was right. The effect of the gift by reference, which precedes the proviso, is to give the personalty absolutely to the son, at once. But the proviso qualifies this by preventing the estate from being absolute unless he attains twenty-one.

I desire to add that I do not think this case comes at all within the principle which governed the decision of this House in the case of *Lord Dungannon* v. *Smith* (1). There the testator gave his leaseholds for years to his son *Arthur* for his life, and after his death to such person as should answer the description of heir male of his body, and should first attain his age of twenty-one years. This was most properly held to be too remote. If I had read the

(1) 12 Cl. & F. 546.

gift in this case as a gift to such person as should answer the description of son of *Ellis*, or heir male of the body of such son, but not to vest in any one not attaining his age of twenty-one years, then the two cases would have been parallel; and I should have thought that this case was governed by the decision in *Lord Dungannon* v. *Smith*. But, for the reasons I have stated, that is not my opinion, and I therefore think the judgment below ought to be affirmed.

LORD ST. LEONARDS:—

My Lords, in this very important case—important in point of law—I come to a conclusion directly opposite to that of my noble and learned friends.

My Lords, in the events which happened, *Ellis* took under the will the real estate for life, with regular remainders over to his sons successively in tail male, with other remainders over. These uses were to operate over real property directed to be purchased. The testator then gave his real estate, and his residuary personal estate, to trustees, who were to stand possessed of the personal estate, and seised of the real estate to such uses, upon such trusts, and for such estates and interests, and with, under, and subject, to such powers and provisions, as were thereby declared of the lands thereinbefore directed to be purchased, or "as near thereto as the rules of law and equity will permit," provided nevertheless, and he thereby declared, that the personal estate should not vest absolutely in any tenant in tail, unless such person should attain the age of twenty-one. The real and personal estates were thus made the subject of one gift to the same uses, with the restriction and qualification as to the vesting of the personal estate. The two descriptions of property were to go together to the same person as far as the rules of law and equity would permit; but no person becoming tenant in tail, of course under the limitations, was to take a vested interest, which I think means a transmissible interest in the personal estate, unless he attained twenty-one.

The will is technically drawn, and must therefore, in my opinion, receive a technical construction. The framer knew well the operation of the words which he used, but it escaped his attention that they might receive an interpretation which, although fully

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justified, would leave the gift of the personal estate open to objection on the ground of its tendency to a perpetuity.

I may relieve the case from some questions upon which I consider that both parties are agreed, and which, in my opinion, are not open to doubt. The trusts are not executory, but *executed*. The testator was his own conveyancer, and the trusts cannot, speaking generally, be treated as valid, and the proviso is only void within the authority of *Egerton* v. *Brownlow*. In this case, therefore, we must construe, not reject the proviso. Although I have said that this will is to be technically construed, yet, of course, the intention of the testator is to be collected from the technical expressions in the will. Let us first consider the question in that light, independently of the question upon the law against perpetuity, and then consider whether that law affects the validity of any of the gifts.

Now, looking to the natural, although technical, construction of the will, what is the true meaning of the direction that, as to the uses declared jointly of both real and personal estate, they shall be held upon them, or as near thereto as the rules of law and equity permit, provided nevertheless, that the personal estate shall not vest absolutely in any tenant in tail, unless he shall attain twenty-one. It appears to me clearly that the whole is to be read as one gift. The realty and personalty were to go together, to the same persons, and, as the rules of law and equity will permit the real estate to go in the channel directed, so far the testator's intention will be fully carried into effect. He had the same intention as to the personalty; and his words, however open to objection, shew that he meant that to go with the real estate to the same person, although he was aware that the rules of law and equity would not permit them to go to the same extent as the real estate. To the extent which the law allowed, he did intend every possessor of an estate tail under his will to enjoy both the properties. The real estate, under the same gift, would go to all the issue male of the tenant for life in succession, every one in his turn taking an estate under the will, either as a purchaser, or by descent under him. As far as the rules of law and equity would permit, the very same persons would, under this joint gift, also take the personal estate.

Then comes the proviso which relates to the personal estate only. That was not to vest absolutely in any tenant in tail unless he should attain twenty-one. The proviso itself, I am clearly of opinion, forms part of the gift. As a real property lawyer, a glance of the eye taking in the whole of the gift, satisfies me on that point. You must strike out the most important part of the gift if you disconnect the proviso from the gift. The testator gave the personalty, with the realty, to the same persons in tail; and those persons would take, as I have already shewn, estates tail in succession under the gifts in the will; but they are only to take transmissible interests in the personalty if they attain twenty-one. This may transgress the rules of law, but still it is what the testator has declared, and what he intended. I may observe that every case of this nature must depend upon its own circumstances, to which the rules of law must be applied. There may be cases where the trust and the objectionable proviso, or declaration, may be distinct, and the former may be valid and the latter void, but this is not a case of that description.

We have now to consider, with reference to the conflicting decisions of the Master of the Rolls and Lord Chancellor *Westbury*, whether the view which I have taken of the construction of the will is the true one, and how far the true construction, when we have arrived at it, affects the validity of the gift of the personalty upon the ground of its tendency to a perpetuity.

The Master of the Rolls held that the gifts were not executory, and that the proviso was part of the trust or gift, and could not be held to be void, as in *Egerton* v. *Brownlow*. Consequently he held the trust to be void as to the personalty, on the ground of its tendency to a perpetuity. It does not appear to have occurred to the learned Judge that the proviso could be so construed as to confine the declaration to the persons who should be tenants in tail by purchase. It was admitted by the counsel for the next of kin (Mr. *Rolt*) that the gift would be valid if the proviso had been confined to tenants in tail by purchase. For the infant tenant in tail it was argued that the proviso was only applicable to the sons of a tenant for life, and therefore had no tendency to a perpetuity; and, if applicable to all tenants in tail, it would simply shew that the proviso was wholly void.

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Upon appeal this decision was reversed by Lord Chancellor *Westbury*. The argument seems to have raised the whole question. The Appellants contended that no one could take this estate who is not a tenant in tail by purchase, to which the Lord Chancellor observed, "Your construction leaves a gap in the will, through which the estate may fall." And in the course of the argument he observed, that a tenant in tail, by descent, of personalty, was a thing not known by the law. The Lord Chancellor said (1) that the Master of the Rolls assumed the fact to be, that the proviso included and applied to tenants in tail, taking the real estate by descent, under the limitations of the devised estates, as well as those taking by purchase. The correctness of that conclusion depended upon the inquiry, whether the disposition made by the will of the personal estate contained or involved any trust for a tenant in tail who took the real estate by descent. He then stated the limitations in the will of the real estate, and the trusts of the personalty, or, rather, the effect of them *without the proviso*, to be for *Ellis* for life, and after his decease for his first or only son, his executors, administrators, and assigns. "But," he added, "when you add the proviso to the disposition of the personal estate, which is made by the words of reference, a *new trust* is created, in the event of any tenant in tail taking personal estate under the trusts, and dying under the age of twenty-one, for the next succeeding tenant in tail, or tenant for life, as the case may be. The only object and effect of the proviso are, to substitute the next tenant in tail, or tenant for life, *taking by purchase*, for the preceding tenant in tail, also taking by purchase, in case such preceding tenant in tail should die under twenty-one." "It is true," he added, "that a contingency very material to be provided for is not included in this proviso;" (I add, in this proviso thus construed). "A tenant in tail, taking the real and personal estate as a purchaser, may marry and have a son, and afterwards die under twenty-one, leaving such son tenant in tail of the real estate" by descent. "In such an event the proviso transfers the personal estate to the next purchaser in the series of limitations, and it becomes severed from the real estate, which descends to the son of the deceased tenant in tail. This event is not provided for by the will, but that cir-

(1) 1 De G. J. & S. 16; 9 Jur. N.S. 110, 111

cumstance does not authorize any different interpretation of the proviso." His Lordship admitted that if the trust had provided for a tenant in tail taking by descent, the whole disposition of the personal estate would be void for remoteness. But no such trust, in his opinion, was either expressed or implied, or in any manner warranted, by the words of the gift of the personal estate, either with or without the proviso. Finally, he was of opinion that the words of gift of the personal estate, taken with the proviso, could not be interpreted to amount to a trust of the *corpus* of the personalty for such tenant in tail only, under the limitations of the real estate, as should first attain twenty-one; so that in the words of the Master of the Rolls the attaining twenty-one would be a precedent condition of the vesting, and it would follow that the gift of the *corpus* of the personal estate would be void for remoteness.

I have found it necessary to state the substance of the judgment of the Lord Chancellor in his own words, and it places the question to be decided plainly and simply before us. Can we so construe the proviso as to introduce into it, after the words "tenants in tail," the words "by purchase," or by construction decide that the words "any tenant in tail" do not include any tenant in tail who takes the estate by descent. It is admitted, of course, that this construction will exclude an important class of issue, who, under the words of the will, would come within the proviso; and the only ground that I find urged in favour of the appeal in the report of the judgment is, that if full effect were given to the plain words of the will, the gift would be open to the objection of its being too remote. The Lord Chancellor does not reject the proviso as part of the donation, but he makes the question depend upon the true construction of the proviso, and holds that the proviso creates a new trust, which can attach only to tenants in tail by purchase. This, of course, excludes tenants in tail by descent. For this no authority has been cited; it alters the words, it defeats the intention, and, as it appears to me, is in opposition to the whole current of authority. I cannot agree that the proviso introduces a new trust. It simply qualifies and restricts the trusts already declared, and is embodied in those trusts. The tenants in tail of the realty shall take the personalty also, but the latter is not to vest abso-

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lutely in any tenant in tail who shall not attain twenty-one. Nothing can be more simple. The words are general, "any tenant in tail," and they are operative and valid as far as the rules of law and equity permit. Those rules restrict the gifts as to personal estate; but you cannot, in order to avoid this, alter the words of the will. It is not that the testator did not mean the words to have their full operation, but that the rules of law and equity do, as he expressly declares his will to be they should, and as they would have done without that declaration, restrict their full operation.

As to the question of law, independently of the adverse decisions in this case, it is fairly admitted that *Lord Dungannon* v. *Smith* (1), unless the two can be distinguished from each other, rules this case. My noble and learned friend near me (Lord *Cranworth*) is of opinion that it does not. I cannot say that he has stated any reason which induces me to think that this case is not governed by *Dungannon* v. *Smith*. That case has been thus stated in the work referred to at the bar, and which has been so much commented upon (2). "Where the estate is so limited that it may vest in a person not born within the legal limit, the devise is altogether void. Therefore, where there is a general limitation, a single gift to one of a class, which may, according to the event, vest the estate in one within the line of perpetuity, or in one without its boundary, the devise wholly fails, although, in event, there is a person answering the description ready to take, who was born within due time." The bequest in that case by will was to the testator's grandson for life, and after his decease to permit such person to take who, for the time being, would take by descent as heir male of the body of his grandson, until some such person should attain twenty-one, and then to convey the same unto such person so attaining twenty-one, his executors, administrators, and assigns. The bequest was held to be void by this House. The case was well calculated to try the rule, as there could be only one taker, and the claimant was that one, and was within the rule of law. The same principle, or very much the same, was acted upon in *Marshall* v. *Holloway* (3), and *Leake* v. *Robinson* (4), although these applied to a class.

(1) 12 Cl. & F. 546.
(2) The Law of Property, c. II. s. III. p. 342.
(3) 2 Sw. 432.
(4) 2 Mer. 363.

I am of opinion that these authorities govern this case; but I have still to consider the ingenious arguments at the bar. The case has been very well argued on both sides. For the Respondent it was insisted that dividing the clause into three parts—first, the gift itself; secondly, the qualification as to the rules of law and equity; and thirdly, the proviso, we are not at liberty to put any construction on to the gift which would include limitations not permitted by the rules of law and equity. But, as the Lord Chancellor stated in his judgment, it is well settled that the disposition made of the personal estate is not extended or altered by the words, "as near thereto as the rules of law and equity will permit." It was farther argued that *Dungannon* v. *Smith* was inapplicable, for there was no series of limitations, only a single gift, which could not be converted into a series, nor could a series be converted into a single gift. In this case there was not one clause descriptive of a class; but, with reference to the limitations of the real estate, the gifts were successive; the uses ought to be repeated: we must transcribe the limitations in the will as applicable to the personalty. I believe that is a true interpretation of the ingenious contention at the bar. I took some pains to ascertain exactly what it was, and the learned Counsel was good enough to repeat it twice. It was objected that the Master of the Rolls, who undertook to write out the gifts of the personalty in words at length, stated them so as to make the case fall within the decision in *Dungannon* v. *Smith*—for *Ellis* for life, and after his death for his eldest son, grandson, or great grandson, and so on, which shall first attain twenty-one, when, and not before, it shall become vested in such eldest son, grandson, or great grandson. This passage certainly does not write out the gifts as they are in the will, but it does state the real operation of the bequest.

If we comply with the demand of the Respondents, and write out the limitations affecting the personal estate, they will stand thus:—To *Ellis* for life (as events happened), with remainder or limitation over to his first and every other son and sons successively, according to priority of birth, and the heirs male of the body of such son and sons, with remainders over. These limitations as to the real estate take effect as directed. The testator knew that that would not be the case as to the personalty, and he therefore

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added the words, "or as near thereto as the rules of law and equity will permit;" upon which I have already observed. Now, the repetition of the uses shews that the nephew was to take for life, and that after him his sons and their sons in all generations were to take with like remainders over. But it does not appear to me to assist the Respondent's case, for the very first limitation in tail male clearly includes sons and sons of sons, and therefore, coupled with the other directions in the will as to personalty, goes beyond what the rules of law and equity permit; and, as I have already said, you cannot, consistently with the authorities, hold that the words of gift can be remodelled so as to strike out the portions which make the general gift void.

But then it was argued thus—There was no gift in the will to sons of sons. The words of reference to heirs male were no gifts to them; there was no gift to issue. The original words give no interest to any person who does not take the realty by purchase. If any such person takes such interest it is by implication from the words that follow. The proviso extends to tenants in tail under the will, but there are no gifts in the will to any one, except to a tenant in tail as a purchaser. This view was much pressed upon the House, in order to confine the proviso to tenants in tail taking by purchase, according to the decision appealed from.

According to this argument, issue in tail taking by descent under a gift to the parent in tail, are not to be considered as taking an estate tail under the gift, when the estate descends to them. Now, the original limitation is necessarily to the parent and the heir or heirs male of his body: no doubt he is the devisee, and is in as a purchaser; but the words, "heir or heirs male of the body," create an estate tail or in tail male, descendible to the issue named, and when the descent takes place, the issue become in succession *tenants in tail;* and although their title wholly depends upon the devise to the ancestor with the superadded words of limitation, yet in a due course of succession they are strictly tenants in tail under the will. It is in this sense that the testator speaks of any tenant in tail. In the lifetime of a father, tenant in tail of an estate, you would predicate of his son that, if he survived his father, he would be tenant in tail of the property.

I am clearly of opinion that this is the true construction of the

words. The decree of the Lord Chancellor should, I think, be reversed, and the decree of the Master of the Rolls affirmed.

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THE LORD CHANCELLOR:—My Lords, I would submit to your Lordships that, as the Courts below differed, and as we have the opinion of my noble and learned friend, which I need not add is entitled to the highest respect, against the decree, the appeal may be considered as having a justification. And as the litigation may be said to have arisen from an ambiguity in the expressions used by the testator himself, I think that in this case the costs should come out of the estate.

LORD ST. LEONARDS:—That is quite of course.

Mr. *Rolt*:—In the Court below, the costs of all parties were given as between solicitor and client.

Sir *Roundell Palmer*:—I offer no objection to whatever your Lordships think right upon that point.

Decree appealed from affirmed; appeal dismissed; costs of the appeal to be paid out of the estate.

Lords' Journals, 27th July, 1866.

Solicitor for Appellant: *O. Lucas.*
Solicitors for the Respondent: *Johnson & Wetherall.*

MARIA DOGLIONI . . . . . APPELLANT;

AND

FRANCISCO JOSE CORTES CRISPIN . . . RESPONDENT.

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July 16, 17, 31.

Domicile—Foreign Court—Will—Personal Property.

The law of the domicile of a deceased person governs the succession to his personal property.

Where, therefore, in a foreign Court, upon the death of a person domiciled in the country where that Court had jurisdiction, *C.* claimed to be the natural son of *H. C.*, deceased, and as such natural son to be entitled by the law of that country to inherit his father's property, and alleged that his

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father was of a particular station in society (which circumstance allowed of such a claim by his natural son), and that the father had died domiciled in the country, and had died intestate, and the foreign Court found all these allegations in his favour :—

Held, that the Probate Court in this country was bound by the judgment of the foreign Court, and had, therefore, rightly admitted *C.* to be heard as contradictor to a will, set up in this country as having been made by *H. C.*, disposing of his personal property here.

THIS was an appeal against a decision of Sir *Cresswell Cresswell*, which had allowed the Respondent to appear as the contradictor of a will set up by the Appellant.

In the course of the last century *William Crispin* appears to have established himself in business at *Faro*, in *Portugal*, and to have obtained from the King of *Portugal* a license to trade there. This license was granted by virtue of a treaty between *England* and *Portugal*, on which was founded a Portuguese ordinance. The license recited that "*William Crispin* is a British merchant, established in the city of *Faro*, to which British nation by the register of these privileges established, &c., it is granted to the noble merchants of this nation that they may be free and able to negotiate, treat, sell, &c." *William Crispin* had an English wife, and he died in *Portugal*, leaving, among other children, *Henry Crispin*, who, like his father, lived and carried on business at *Faro*. *Henry Crispin* died in 1828, unmarried. The Appellant was his only surviving sister, and claimed his property as his surviving residuary legatee under a will which she alleged was made by him on the 25th of July, 1825, in conformity with the laws of *Portugal*, and also in the English form. It appeared that in this character she had possessed herself of property formerly belonging to her brother *Henry Crispin*.

In 1852 *Barbara Julia Cortes* obtained an act of affiliation, granted according to the laws of *Portugal*, by which the Respondent was declared to be the son of herself and of *Henry Crispin*, deceased, and to have been born in the month of October, 1816. In March, 1853, the Respondent, founding himself on this act of affiliation, instituted a suit against the Appellant and her husband (since deceased), and cited them jointly in the Court of First Instance at *Faro*, praying to be declared *Henry Crispin's* natural son, and, as such, entitled to the whole of his property, the said

Henry Crispin, as the Respondent alleged, having died intestate. The law of *Portugal* allowed such a claim if the alleged father was a *pion*, or plebeian, and not of noble (1) rank, and if the child was born during cohabitation with one woman between whom and the father no legal impediment to marriage existed. The Appellant contested the claim; principally on the grounds that *Henry Crispin* was an English subject, and so not subject to the laws of *Portugal;* and that, if so subject, then he was a merchant, and, as such, not to be deemed a pion, but a noble, and consequently his property was not affected by the law which put the illegitimate children of pions on a footing with their legitimate children, and enabled an only legitimate son to succeed to the whole property of an intestate father, and prevented such a father from disposing of more than one-third of his property by will. The will of *Henry Crispin* was produced in the course of the cause, but only as a piece of evidence on the claim then set up, and did not appear to have been discussed on any question as to its validity. The Court of First Instance decided in favour of the present Respondent, declaring that he was the natural son of *Henry Crispin;* that *Henry Crispin* was not noble, that he died domiciled in *Portugal*, that his succession was regulated by Portuguese law, and that the inheritance must be delivered to his son. This decision was confirmed on appeal, first by the Court of *Relaçao*, and next by the Supreme Tribunal at *Lisbon*.

There being certain government stock in this country which had been the property of *Henry Crispin*, the Respondent, in December, 1859, instituted a suit in the Court of Probate in order to obtain the grant of administration here. A caveat was entered by the Appellant, who set up the will made in her favour, and the cause came on before Sir *Cresswell Cresswell*, who directed a trial by a special jury on one issue of fact raised between the parties, namely, whether the Respondent was the illegitimate son of *Henry Crispin*. The jury found a verdict in the affirmative.

(1) The word used in the papers and during the discussion was *noble*, but in the Ordinance, on which the license was founded, the word used is *knightly*, and the meaning is shewn by its being applied to a person who keeps a horse to ride, not in his trade and business, but for pleasure. Our English word gentry would be more truly descriptive.

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There were three other issues raised, and these came on for hearing before the learned Judge alone in the Court of Probate. They were: first, whether the law on which the Respondent relied was applicable to any but Portuguese subjects; secondly, whether *Henry Crispin* was to be deemed a Portuguese subject; and, thirdly, whether *Henry Crispin* was not to be deemed a merchant, and, by the law of *Portugal*, noble, so as to be excluded from the operation of the law which affected pions. The learned Judge heard evidence, both of fact and law, on these questions, and on the 27th of May, 1863, delivered judgment in favour of the Respondent. His decision proceeded on the ground that *Henry Crispin* having died domiciled in *Portugal*, the succession to his personal estate must, according to the case of *Enohin* v. *Wylie* (1), be determined by the law of *Portugal*, and that the Court here was bound by the judgment of the Portuguese Court; "and that the effect of the said judgment, so confirmed as aforesaid, was that the Plaintiff (the present Respondent) was entitled to the inheritance of the deceased." He therefore declared that the Respondent should be "admitted as a contradictor of the will alleged to have been made by the deceased."

This was an appeal against that decision.

The *Attorney-General* (Sir *H. M. Cairns*), and Mr. *Cleasby*, Q.C. (Mr. *R. E. Turner* was with them), for the Appellant:—

The judgment in the Court below assumed to proceed on the decision of this House in the case of *Enohin* v. *Wylie* (1), but that really does not govern the present case. There was here no will to be construed, nor was the Court here asked to take upon itself the office of a Court of construction. The decision here is, that the English Court is conclusively bound by the decision in the Portuguese Court, as to the title to the inheritance,—the whole property. The words are, that the Respondent is "entitled to the inheritance of the deceased." This is a decision which, in form affects and determines every possible question between the parties; it decides on the validity of the will, and, under colour of being an affirmance of a legal proposition, determines more than the judg-

(1) 10 H. L. C. 1; 8 Jur. (N.S.) 897; 9 Jur. (N.S.) 653

ment which it appeared to follow. It is, therefore, bad. There is, besides, no authority for saying that the decision of a foreign Court is of force here for such a purpose. [THE LORD CHANCELLOR:—The meaning of that phrase is shewn by the sentence which follows it, namely, that the "Respondent is therefore entitled to be admitted as a contradictor of the will."] That may be so in one sense, but as the judgment stands now, what is the position of the contradictor? It is that of a person who is deemed to have established the domicile of the deceased, and his intestacy, and thereby established his own title to the inheritance. This is adjudicating the whole case. [THE LORD CHANCELLOR:—It amounts to this, that the Respondent is the natural son of a person domiciled in *Portugal*, not a noble, and as such he is entitled to succeed to the inheritance of his father's property—two-thirds in case of there being a will, the whole in case of intestacy.] The two judgments could hardly stand together, if the English judgment is to be taken in that restricted sense: one declaring the Respondent entitled to the inheritance, and the other assuming that the will which would, in any such event, take away from him one-third of the inheritance, might be established. In fact, therefore, this is a decision against the will, which was not formally before the Court, and it is consequently erroneous. The judgment ought to have been confined to declaring that the Portuguese Court had finally decided that the Respondent had made out a certain relationship to the deceased.

The judgment in *Portugal* is not conclusive, even if within the authority of *Enohin* v. *Wylie*. The foreign judgment is good in its entirety, or it is not good at all. If the question of the will is still open, there is one point on which there has been no decision. The Portuguese Court appears to say that the Respondent is entitled to the whole property; the Probate Court says, to the inheritance, which seems the same thing; but if the result is only to admit the Respondent to contest a will, then the one judgment does not fully adopt the other, and is erroneous. Now *Enohin* v. *Wylie* did not decide that if a foreign judgment could not be supported in its entirety, it could be supported for what was good, and amended for what was bad; nor does any other case lay down such a doctrine.

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The appeal here may be sustained on another ground. The Respondent has put his case on the fact that his title to the property has been recognised in the Portuguese Court. But that will only found a claim in this country, not conclusively establish it. The judgment may be examined, and if erroneous, disregarded. This subject is discussed at great length in the notes to the case of *Doe* v. *Oliver* (1), and the judgment of Lord Chief Justice *Tindal* in *Smith* v. *Nicolls* (2) is cited, where he said that with regard to foreign judgments, it is not even now quite settled to what precise extent they are binding in this country. "Great doubts have formerly existed, and some degree of doubt still exists, whether a judgment so recovered is conclusive between the parties, or may be opened and agitated in this country." It is clear that such a judgment is not a merger of the original cause of action. In a suit for the price of goods, if a party recovers a judgment abroad he may sue in assumpsit on that judgment in this country, or he may sue on his original cause of action. And it is truly observed in the note before referred to (3), that a judgment against a man suing in one capacity does not estop him when he is suing in another and distinct capacity. [THE LORD CHANCELLOR:—That cannot be said to be the case here. The decision is, that the judgment of the Court in *Portugal* was conclusive as to the *status* of the Respondent, nothing more.]

The *Queen's Advocate* (Sir *R. Phillimore*), and Mr. *Hannen*, for the Respondent:—

In the Probate Court, after the verdict on the question of natural son or not, the case was narrowed to this, whether the Respondent was entitled to come into our Courts, and to say to the Appellants, I have a right to contest the will which you set up. All that was said here was, that the judgment in the suit in the Portuguese Court must be taken as conclusive on that point. What was that suit? It was to set up a title to make a claim on the property of *Henry Crispin*. The validity of the will was not in question. The will was not propounded at all; nor was the amount to which the Respondent's claim might be extended at all discussed. On that ground there is no pretence for the

(1) 2 Sm. L. C. 682. (2) 5 Bing. N. C. 221. (3) 2 Sm. L. C. 667.

present appeal. Nor is there on the form of the decree, which is not divided into two parts, but which declares the force of the foreign judgment, and therefore allows the Respondent to be heard as a contradictor of the will. The judgment here is in accordance with the settled law of the Ecclesiastical Court, where the very slightest title is held sufficient to justify a party in being heard in opposition to a will.

The *Attorney-General*, in reply, introduced the question of the extent to which the judgment of the Probate Court went. The question of natural son was concluded, not by the finding of the foreign Court, but by that of the English jury. But as to the other questions, the decision in the Court below could not be treated as conclusive.

The *Queen's Advocate*, and Mr. *Hannen*, were heard on this point:—

The question of the validity of the will is open to be discussed. It is doubtful whether the question, noble or not noble, can be discussed. Where the parties are the same, and the issues raised are the same, the finding of the foreign Court is conclusive: *Barrs* v. *Jackson* (1). *Story's* Conflict of Laws (2) is to the same effect, and *Ricardo* v. *Garcias* (3) is decisive on the point.

The *Attorney-General*, in reply:—

To come within the rule in *Barrs* v. *Jackson*, or within the principle declared by *Vinnius* in his Commentary on the Institutes (4), the parties and the question, in both Courts, must be identical. In a recent case, a decision of Vice-Chancellor *Wood*, recognising, as conclusive on him, a judgment of another Court, was, because this identity of parties and interest did not exist, overruled by Lord Chancellor *Westbury*. The parties here do not fill the same character as in the Court in *Portugal*. There, the Appellant was defending her possession of all the property: here she sets up a distinct claim under a will. Here, too, the

(1) 1 Ph. 582, overruling the decision of the Court below, 1 Yo. & Co. C. C. 585.

(2) Chap. XII. s. 481.

(3) 12 Cl. & F. 368.

(4) Tit. XIII. Lib. 4.

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original judgment declared the Respondent entitled to the inheritance of the deceased. The judgment of the Court below adopted those words. Those words meant the whole property; yet now it is said that they must be taken to mean the property in so far as not affected by a will. The judgment being thus admitted to be indefinite, or rather to have a meaning which its words did not convey, it cannot be supported.

July 31. THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, this is an appeal from a decree of the late Judge of Her Majesty's Court of Probate, admitting the Respondent as a contradictor to a will, alleged to have been made by *Henry Crispin*, who was domiciled in *Portugal*, where he died a bachelor, without lawful issue, in January, 1828. The Respondent is the illegitimate son of *Henry Crispin*, and claimed, in that character, to be entitled to succeed to the whole of his father's property if he died intestate, and to two-thirds of it if he left a will, his father, according to the laws of *Portugal*, having been a pion, or plebeian, and not noble. Upwards of thirty-six years after the death of *Henry Crispin* the Respondent instituted a suit against *Lazaro Doglioni*, the husband of the Appellant, and the Appellant jointly, in the Court of First Instance at *Faro*, praying to be declared *Henry Crispin's* son, and entitled as such to his property, *Henry Crispin* having died intestate. The *Doglionis*, in their answer to the libel, denied that the present Respondent was the son of *Henry Crispin*, and alleged that, even if he was, he was not entitled to succeed to the inheritance, because *Henry Crispin* was a British subject, and his succession was not to be regulated by Portuguese law, which applied only to Portuguese subjects, and because *Henry Crispin* was noble, not plebeian.

The proceedings in the Court of First Instance are extremely voluminous, and difficult to follow. It appears that, in the course of them, a will of *Henry Crispin*, dated July 25, 1825, was brought into Court by the Appellant and her husband, not (as it would appear) by way of answer to the claim of the Respondent to the whole inheritance of his father, but for the purpose of disproving the paternity altogether. At a subsequent day the Respondent, desiring to impeach the genuineness of the will,

required that the notary public of the Court should inquire into certain particulars as to the size and water-mark of the paper, as compared with other paper in the notarial book, the colour of the ink, and other alleged suspicious appearances of the document. The notary afterwards certified to the Court in the affirmative of all the circumstances of suspicion to which the Respondent's questions were directed. The Court, in giving judgment, rejected the will as matter of evidence (as I understand it) to disprove what is called "the paternal and maternal affiliation" of the Respondent, and finally decided that the Respondent was proved to be the son of *Henry Crispin;* that *Henry Crispin* was not noble; that, being domiciled in *Portugal*, the succession to his property was to be regulated by Portuguese law; and the judgment closes in these words: "Therefore, in presence of the process and disposition, which I confirm, I judge the action proved and regular, declaring the Plaintiff natural son of *Henry Crispin*, and condemn the Defendants in the demand, costs, and legal fine." Against this sentence the Appellant and her husband appealed to the Court of *Relaçao*, at *Lisbon*. That Court affirmed the sentence. An appeal was afterwards made to the Supreme Tribunal, and there the sentence was also affirmed.

The suit in which the decree appealed from was pronounced, was instituted in the Court of Probate by the Respondent, in order to obtain administration of part of the personalty of *Henry Crispin* in this country. A caveat being entered for the Appellant, a warning was issued by the Respondent, who was described as the natural son of *Henry Crispin*, and the sole person beneficially entitled to the estate and effects of the deceased. An appearance was entered for the Appellant, who was described as *Maria Doglioni*, of *Faro*, in *Portugal*, widow, and the sister, and the surviving residuary legatee named in a will of the said *Henry Crispin*, dated the 25th of July, 1825. The Respondent was thereupon ordered by the Court of Probate to declare and propound his interest.

A declaration having been filed by the Respondent, and the Appellant having pleaded, traversing all the material averments in the declaration, issues were joined between the parties. The first issue, which was whether the Respondent was the natural son

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of *Henry Crispin*, was tried by a special jury, and found in the Respondent's favour. The other issues raised were tried by the Judge himself, without a jury. He held that the fact of the domicile of *Henry Crispin*, of his being plebeian, and not noble, and of the law of *Portugal* applying to his succession, having been determined in the Courts of *Portugal*, which was the proper *forum*, he was bound by the judgment pronounced by the Court of First Instance, and affirmed by the Court of *Relaçao*, and afterwards by the Supreme Court of *Lisbon*, and he thereupon made the decree appealed from. That decree is this: "That *Henry Crispin*, the deceased in this cause, was, at the time of his death, domiciled in the kingdom of *Portugal;* and that the said deceased died a bachelor, leaving the Plaintiff his only and natural son; and that a suit, as in the declaration mentioned, was commenced in the Court of First Instance at *Faro;* and that a judgment was recorded in such Court, as in the declaration alleged; and that the said Court had jurisdiction in the said suit; and that the judgment of the said Court is, unless reversed by a competent Court of Appeal in *Portugal*, final and conclusive, and remains of full force and effect; and that the said judgment, on appeal, was confirmed by the Supreme Court of *Relaçao*, at *Lisbon*, and the Council of the Supreme Tribunal at *Lisbon*, both of which last-mentioned Courts had jurisdiction in this suit, and which said confirmations have not been reversed; and that the said judgment, so confirmed as aforesaid, is, and ought to be, deemed and taken of legal force and effect in this suit; and that the effect of the said judgment, so confirmed as aforesaid, was, that the Plaintiff was entitled to the inheritance of the deceased. And the Judge farther pronounced and declared that the Plaintiff in this Court should be admitted as a contradictor of the will alleged to have been made by the deceased."

This decree is objected to upon the ground that it finds the effect of the judgment in the Portuguese Courts to be, that the Plaintiff was entitled to the inheritance of the deceased, which it is said must mean the whole of the inheritance; whereas the Courts in *Portugal*, not having the will before them, could not, and did not, pronounce anything as to its validity or invalidity; nor did they decide anything more than that the Respondent was the natural

son of *Henry Crispin*. And the Counsel for the Appellant contended that this part of the decree will operate to prevent her establishing the will, to which the decree admits the Respondent to be a contradictor.

Before considering this objection to the decree, it is necessary to determine the question which has been raised as to the conclusiveness of the foreign judgment. It is contended on the part of the Appellant that the judgment is not conclusive in the present case, because it was between different parties, and the subject matter was different. It appears to me, however, that, although the objects of the suits in the two countries were in some degree different, the parties were the same, and the facts to be established were the same. In *Portugal* the object of *Francisco Crispin's* suit was to prove by the laws of *Portugal* his right to the inheritance of *Henry Crispin*, as natural son of that person, who had been domiciled in *Portugal*, and was not noble, and did die intestate. The proceeding in the Probate Court was on a claim of the Respondent to be admitted as a contradictor of an alleged will, which he could only be by reason of his being entitled to the inheritance by the laws of *Portugal*, as the natural son of *Henry Crispin*, not noble, and dying there intestate. The suit in *Portugal*, therefore, covered the whole of the case before the Court of Probate; and as the learned Judge said, the very same points were then raised that have been put in issue in this Court. He held the judgment in favour of the Plaintiff to be conclusive upon him, and entertaining this opinion, I hardly understand why the fact of the Respondent being the natural son of *Henry Crispin*, which was the very foundation of the whole claim in the Courts in *Portugal*, and which was established to the satisfaction of the foreign Court, and entered into and formed part of the judgment, was singled out for trial. But the fact being proved, it was in this country established by the verdict of a jury, and all the other points which went to make up the Respondent's title being conclusively settled by the judgments of the Courts in *Portugal*, the learned Judge of the Court of Probate had only to pronounce that the Respondent had made out his right to be admitted as a contradictor.

It is said that, in referring to the legal force and effect of this judgment, the learned Judge improperly declared the effect of it

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to be, that the Plaintiff was entitled to the inheritance. This, it was said, meant the whole inheritance; and it was contended that, as the decree stood, it would furnish a conclusive answer to the will which the Appellant was seeking to establish. It appears to me, however, that the wording of the decree can have no such prejudicial consequence. The question to be decided by the Judge of the Court of Probate was, whether the Respondent had any interest in respect of which he ought to be admitted as a contradictor. For this purpose it was immaterial whether he was entitled to the whole, or to a portion only, of the inheritance. It must be observed also, that the learned Judge has not decreed anything on this subject, but has merely stated his conclusion as to the effect of the judgment. Now, he is perfectly correct in the conclusion which he has thus drawn. As already observed, the will, of the same date as that in the Court of Probate, was not brought forward by the Appellant and her husband in the Court in *Portugal* for the purpose of shewing the testacy of *Henry Crispin*, but merely to render the sonship of the Respondent to *Henry Crispin* improbable. If this will is really genuine, the Appellant and her husband ought to have met the portion of the Respondent's claim which rested upon the intestacy by insisting upon the will as a proof that, at all events, he could be entitled only to two-thirds. It was their fault that the Court in *Portugal* had no opportunity of deciding upon the will as a distinct ground of defence, or, at all events, in reduction of the claim. And, being brought forward almost incidentally as a matter of evidence, the Court, being satisfied in favour of the Respondent, had only to declare him entitled to the whole of the inheritance. The learned Judge of the Court of Probate was, therefore, perfectly correct in describing the effect of this suit as entitling the Respondent to the "inheritance" of *Henry Crispin*, even if that word means the whole inheritance.

Under these circumstances I do not think that ground has been laid for the alteration or qualification of the decree in any respect, and I think it ought to be affirmed as it stands.

LORD CRANWORTH:—

My Lords, it is admitted or established that, in fact, *Henry Crispin* died at *Faro*, in *Portugal*, in January, 1828, and that at the

time of his death he was domiciled there. His personal estate must, therefore, be administered according to the laws of *Portugal*, not according to the laws of this country.

In the month of March, 1853, the Respondent instituted proceedings in the Court at *Faro* against the Appellant, who was the sister of the deceased *Henry Crispin*, alleging that at his death she had possessed herself of his personal estate, but that, by the laws of *Portugal*, he, the Respondent, was the person entitled to the succession of the deceased; for that he was the illegitimate son of the deceased *Henry Crispin;* and that in certain circumstances (which existed in the case of the Respondent), a natural son succeeds to his father's personal estate. This demand was strongly resisted by the Appellant. She disputed the paternity of the Respondent, as well as the facts, which, if he was the illegitimate son of *Henry Crispin*, would entitle him to his succession; and she also disputed the law as insisted on by the Respondent.

The claim, however, of the Respondent was sustained after long litigation; first, in the Court at *Faro;* afterwards, in the Court of *Relaçao;* and, ultimately, by the final Court of appeal at *Lisbon*. This decision is absolutely binding on the Courts of this country.

The question in this case has arisen in consequence of the Respondent having applied to the Court of Probate for the purpose of obtaining letters of administration of a part of the personal estate of the deceased which is situate in this country. A caveat was entered by the Appellant against any grant of letters of administration to the Respondent. She opposed any such grant, claiming to be the person entitled to the personal estate of the deceased, as being his sister and surviving residuary legatee named in a will alleged to have been made by him, and to bear date on the 25th of July, 1825. Proceedings were had in the Court of Probate, according to the course of that Court, in which the Respondent filed a declaration stating all the facts according to which he claimed to be entitled by the law of *Portugal* to the personal estate of the deceased. To this the Appellant pleaded, traversing all the material averments in the declaration. The first averment was, that the Respondent was the natural son of the deceased *Henry Crispin*. This was traversed by the Appellant, and issue was joined upon it. This issue, at the instance of the

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Appellant, was tried by a special jury. The jury, after a trial which lasted several days, found a verdict for the Respondent, *i.e.*, that he was the natural son of *Henry Crispin*. The remaining issues raised the question whether the other circumstances existed which entitled the Respondent, by the laws of *Portugal*, to succeed to the personal estate of his father. Evidence was gone into, and several Portuguese lawyers were examined as to what the law of *Portugal* was in such a case. The cause was heard before Sir *Cresswell Cresswell* in the month of May, 1863. That very learned Judge came to the conclusion that he was bound by the decision of the Portuguese Courts, and so was not called on to consider the evidence before him, and he accordingly pronounced the decree now appealed from.

Of the propriety of that decree I entertain no doubt whatever. No principle can be better established than that the administration of the personal estate of a deceased person belongs exclusively to the country in which he is domiciled at his death. The Courts of that country must decide who is entitled, and from their decision there can be no appeal. It does not always happen, as is the case here, that the claim of the party litigating in our Courts has been actually raised and decided in the Courts of the country of the domicile. It is, therefore, often matter of necessity that our Courts should receive evidence from learned foreigners as to what the law of the domicile is. Such evidence is in general far from satisfactory, but it often happens that no better evidence can be obtained, and then the Courts here must ascertain, from conflicting testimony, as well as they can, what the law is on which they must act. But here we are left in no doubt. The title of the Respondent has been fully adjudicated upon by the Courts of his domicile after long and careful consideration, and by their decision we are bound.

It was pressed upon us that the litigant parties here are not the same as those before the Portuguese Courts; or, at all events, that they do not appear sustaining the same character. Here, it was argued, the Appellant litigates as a person entitled to insist on a will. In *Portugal* she was sued as the party in possession of the personal estate of the deceased. I do not feel the force of this objection. The Respondent is not insisting here on the Portuguese

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decision as a bar to the Appellant's demand on the mere ground that it is *res judicata*, but on the ground that it is the decision of a Court of exclusive jurisdiction—a decision which we are bound to receive without inquiry as to its conformity or nonconformity with the laws of the country where it was pronounced.

The only part of the proceedings below to which I think reasonable exception might be taken, is the course adopted by the learned Judge in going into any part of the question as a subject open to him for inquiry. The decision in *Portugal* was a bar to any inquiry, and, therefore, ought to have superseded all inquiry here as to the title of the Respondent. This, however, does not affect the validity of the decree pronounced.

I concur, therefore, entirely with my noble and learned friend in thinking that the decree appealed from should be affirmed.

Judgment appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 31st July, 1866.

Proctors for the Appellant: *Dyke & Stokes.*
Proctors for the Respondent: *Mercer & Mercer.*

GEORGE SIMPSON AND OTHERS . . . . . APPELLANTS;

AND

THOMAS HOLLIDAY . . . . . RESPONDENT.

1863
July 23, 24, 27.

*Patent—Specification—"Or"—New Trial—Construction—Court of Appeal in Chancery—*21 & 22 *Vict. c.* 27, *ss.* 3, 6.

Port 338
6 H.L. 446
2 Ch D. 93.
96-7-9

The Court of Appeal in Chancery has not, under the 21 & 22 Vict. c. 27, power, on an application for a new trial, to reverse the findings of a Vice-Chancellor on issues of fact tried before him, but, where the issues raise mixed questions of law and fact, if the decision of one of the questions discussed is sufficient to dispose of the case, the Court of Appeal may give a final judgment upon it, without ordering a new trial.

A patent for "improvements in the preparation of red and purple dyes" thus described the process: "I mix aniline with dry arsenic acid, and allow the mixture to stand for some time, *or* I accelerate the operation by heating it to, or near to, its boiling point, until it assumes a rich purple colour." It

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was proved (and not denied by the patentee) that it was necessary to apply heat in order to produce the colour; but evidence was given that a competent workman would apply heat:—

Held, however, that this description in the specification was bad, and the patent founded thereon was invalid.

IN January, 1860, letters-patent were granted to one *Henry Medlock*, "for improvements in the preparation of red and purple dyes." This patent came by assignment to the Appellants, who charged the Respondent with an infringement of it. A bill was filed in Chancery for an injunction and accounts, and the cause was set down for trial before Vice-Chancellor *Wood*, without a jury, on the five following issues:—1. Whether the invention was a new manufacture. 2. Whether *Medlock* was the true inventor. 3. Whether his specification did "particularly describe and ascertain the nature of the said invention, and in what manner the same is to be performed." 4. Whether it was of public utility. And 5. Whether *Holliday* had infringed it. The specification was put in evidence, and the descriptive portion appeared to be in these terms: "I mix aniline with dry arsenic acid, and allow the mixture to stand for some time; or I accelerate the operation by heating it to, or near to, its boiling point, until it assumes a rich purple colour: and I then mix it with boiling water, and allow the mixture to cool: when cold, it is filtered or decanted. . . . The mixture of aniline and arsenic acid, after being heated, may be allowed to cool, and then forms a paste, which may be preserved; when required for use, it is mixed with boiling water, and treated as above described. . . . What I claim is, the manufacture or preparation of red and purple dyes by treating aniline with arsenic acid, as hereinbefore described."

It was proved that the Respondent had made and sold the dye mixture described in this specification, and which he named "Magenta."

The Vice-Chancellor heard a great deal of evidence on the subject, and on the 15th of July, 1864, found a verdict on all the issues in favour of the Appellants; and on the 20th of July, on motion made before him, His Honour granted an injunction. Notice was given by the Respondents of an application to be made to the Lord Chancellor to re-try the case on these issues,

and that the findings of the Vice-Chancellor might be reversed or varied, and the record altered accordingly; or that such farther order might be made as to His Lordship should seem meet. The case was heard before Lord Chancellor *Westbury*, on six days, in November, 1864; and on the 14th of July, 1865, His Lordship delivered judgment, reversed the findings of the Vice-Chancellor, discharged the Order of 20th of July, dissolved the injunction, and dismissed the bill with costs. His Lordship declared that, in his opinion, the patent was void in law, on the ground that the specification did not properly describe the invention.

The Appellants at first applied for leave to disclaim that part of the specification which had been pointed out in the Lord Chancellor's judgment as objectionable. This application was heard before the Solicitor-General, who refused to allow the disclaimer (1). This appeal was then brought.

Mr. *Grove*, Q.C. (Mr. *M. Giffard*, and Mr. *H. T. Holland*, were with him) for the Appellants:—

The decree of the Lord Chancellor is erroneous in form and substance. On a Petition substantively for a new trial he has neither refused nor granted a new trial, but has reversed the findings of the Vice-Chancellor on the facts, and dismissed the Plaintiff's bill. The Court of Appeal in Chancery does not possess any power in a case of this sort, other than that which belongs to a Court of common law. There the application for a new trial would have been granted or refused: nothing else. This question depends on the 3rd and 5th sections of the 21 & 22 Vict. c. 27 (2). The effect of them is to give a party dissatisfied with the finding of a Vice-Chancellor a power of appealing, *Fernie* v. *Young* (3), as can be done at common law, *Seed* v. *Higgins* (4); and there it is clear that if a verdict is given for one party, though that verdict may be set aside and a new trial had, a verdict cannot be entered for the other party except by consent. The only course is to grant a new trial. In the Court below, the Lord Chancellor, on an application for a new trial, exercised a judgment on the

(1) See *Ralston* v. *Smith*, 11 H. L. C. 223.

(2) See them quoted in *Fernie* v. *Young*, *ante*, p. 65, n.

(3) *Ante*, p. 63,

(4) 8 Ell. & Bl. 755, 778; 8 H. L. C. 550;

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patent itself, and, as a matter of law, declared it to be void, when that was a question of fact and not of construction, and ought to have been decided in a new trial on evidence alone. This was not the case of the construction of a written instrument alone, but depended altogether on facts which were to shew that the discovery patented was or was not new, and was or was not useful. It did not therefore resemble *Bush* v. *Fox* (1), but it did resemble *Betts* v. *Menzies* (2), in which it was declared that even in a case of two conflicting patents, where everything appeared to depend on the comparison of the two, the Court could not decide as a matter of construction, but, there being words of art used, evidence must be resorted to, and the validity of the patent must be treated as depending on a matter of fact. This might be so, even if the question appeared to be one of grammatical construction: *Walton* v. *Potter* (3), where Lord Chief Justice *Tindal* left the description in the specification to the jury, saying, "You will say for yourselves whether this is made intelligible or not." Words which might make a bad plea might make a good specification; the same strictness is not required in both.

In all cases of patents one material question is, whether the words employed would enable a workman skilled in such matters to carry the directions in the specification into effect. That question was entirely disregarded in the Court below, or, rather, the decision was made contrary to the evidence, for the evidence proved that any workman would have applied heat to the mixture, yet, because of a doubtful word as to the application of heat, the patent was declared invalid. Now *Morgan* v. *Seaward* (4); *Galloway* v. *Bleaden* (5); *Beckford* v. *Skewes* (6); all shew that a patent is to be read by those who are to construe it as it would be read by a skilful workman. *Beard* v. *Egerton* (7); *Russell* v. *Cowley* (8); *Arkwright* v. *Nightingale* (9); *Harwood* v. *The Great Northern Railway Company* (10); may all be referred to as examples of the application of that rule. Nor, in construing a patent, can

(1) 5 H. L. C. 707.
(2) 10 H. L. C. 117; 6 Jur. N. S. 29
(3) 1 Webs. Pat. Cas. 585, 596.
(4) Ibid. 176.
(5) Ibid. 521.
(6) 1 Webs. Pat. Cas. 218.
(7) 8 C. B. 165.
(8) 1 C. M. & R. 864.
(9) 1 Webs. Pat. Cas. 60.
(10) 11 H. L. C. 654.

any particular sentence be, as it was here, taken by itself, but all the parts must be taken together: *Neilson* v. *Harford* (1).

In the Court below the word "*or*" was much relied on as shewing that no positive direction was given to apply heat to the mixture. But in patent cases the word "*or*" may sometimes be construed "*and*," and ought to be so construed if a competent workman would so read it. In this case it was proved that a competent workman would so have read it. And, as in *Hills* v. *The London Gas Company* (2), the word "or" may be read with reference to the evidence, and, so read, does not necessarily create any doubt. If the words used are not calculated to mislead, they are sufficient, and here the word "or" does not create any difficulty, as it did in *Stevens* v. *Keating* (3). The true principle on which a Court of equity proceeds in construing a patent is to support, and not to invalidate it, and the evidence here shewed that the patent, being for a new manufacture which was valuable in itself, and which any competent workman could produce under the directions of the specification, ought to be supported.

No Counsel appeared for the Respondent.

27th July. THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, at the close of the argument in this case I abstained from expressing any opinion upon it, not because I felt any doubt as to the judgment of Lord Chancellor *Westbury* with respect to the invalidity of the patent, but in order that I might be the better able to advise your Lordships as to the proper mode of dealing with the decree under appeal.

I will remind your Lordships that five issues were appointed by Vice-Chancellor *Wood* to be tried before him without a jury, four of them raising questions as to the novelty and utility of the invention, as to the Plaintiffs being the first and true inventors, and as to the alleged infringement by the Defendant; and one being whether the specification did particularly describe and ascertain the nature of the invention for which the letters-patent were granted. The Vice-Chancellor found all these issues in

(1) 8 M. & W. 806. (2) 5 H. & N. 312, 368.
(3) 2 Ex. 772.

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favour of the Plaintiffs. But upon appeal to the Lord Chancellor he was of opinion that the patent was void in law. His Lordship was then pressed to dispose of the other five issues, but he was of opinion that it was useless to inquire into questions as to the novelty and the infringement of a void patent, and he, therefore, without argument, made the decree appealed from, declaring the patent to be bad and void in law, and reversing the findings of the Vice-Chancellor upon the other issues. So far as respects this latter part of the decree, it is impossible that it can stand; but this will not be of much importance, supposing your Lordships should be of the same opinion as the Lord Chancellor with respect to the invalidity of the patent.

This question turns upon the description of the patentee's invention contained in his specification. The patent is for "improvements in the preparation of red and purple dyes." The specification thus declares the nature of the invention: "I mix aniline with dry arsenic acid, and allow the mixture to stand for some time; or I accelerate the operation by heating it to, or near to, its boiling point, until it assumes a rich purple colour."

The construction of a specification, like other written documents, is for the Court. If the terms used require explanation, as being terms of art or of scientific use, explanatory evidence must be given, and with its aid the Court proceeds to the office of construction. In this there is no necessity for any scientific evidence, as there can be no doubt of the meaning of the language used by the patentee. His invention, as he describes it, is the mixing of aniline with dry arsenic acid, for the purpose of producing a rich purple colour, and he adds, "*or* I accelerate the operation by heating it to, or near to, its boiling point." In this description the operation itself is mixing aniline with dry arsenic acid; the addition of heat is described merely as accelerating that operation. There is nothing upon the face of the specification to shew that the invention described is not in every part of it the subject of a patent. But it was proved in evidence, and admitted by the Plaintiff, that mixing aniline with dry arsenic acid without the application of heat would produce only a faint colour, quite unfit for dyeing purposes.

It was contended, on the part of the Appellants, that the word "or" in the specification ought to be read "and." But there is

nothing in the terms of the descriptions, nor upon the face of the specification itself, which would justify the Court in thus changing the form of the expression. It was also said that there was a considerable body of evidence to shew that skilled persons, to whom the specification must be taken to be addressed, found no difficulty in working it out, and applied heat in the process as a matter of course. This, however, cannot have any effect upon the construction of the specification. It merely proves that the description, though erroneous, is not likely to mislead skilled workmen. That the description may induce the necessity of experiments appears from the evidence of an experienced chemist, who says, "If I found there was no action without heat, I should heat it immediately."

The construction of the specification remaining untouched by the evidence, and the Court being informed that the invention which is claimed is incapable of producing the result intended, it had no other course to pursue than to pronounce the patent to be void.

It is said that the finding of the Vice-Chancellor upon the issue as to the specification being compounded of law and fact, and evidence being necessary in order to enable him to arrive at a conclusion upon it, the Lord Chancellor, upon appeal, had no power to declare the patent to be void, but could only direct a new trial. In support of this proposition, the *Chancery Regulation Act* (21 & 22 Vict. c. 27) was referred to. The 5th section of that Act is the one applicable to this case, as the trial took place before the Vice-Chancellor without a jury. By the proviso at the end of that section, "any person may apply for a new trial, either to the Judge before whom the trial was had, or to the Court of Appeal in Chancery." Where the trial is before the Judge alone, he has of course to decide both the law and the fact. If one of the issues raised before him involves a question of law, the form of his finding must be the same on that issue as on any of the issues of fact. Upon an application for a new trial to the Court of Appeal, if that Court differs with the Judge upon the question of law, can it be said that the Appeal Court must be compelled to send the case down again for a new trial, and is not at liberty to decide the question itself? In this case the issue upon the specification was

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in part a question of law, and the fact which shewed its invalidity was not only proved, but admitted by the Appellants. It would be the height of absurdity to send the case to a new trial merely to try an undisputed fact, upon which the construction of the specification does not depend, but which shews that the patent is void.

I am of opinion that the Lord Chancellor was quite justified in disposing of the issue upon the validity of the specification as he did. And I think the proper mode of dealing with his decree will be by affirming that part of it which declares the patent to be bad and void in law, and to reverse it so far as it orders that the findings of the Vice-Chancellor be reversed.

LORD CRANWORTH:—

My Lords, I entirely concur with my noble and learned friend. I think that the decree of Lord Chancellor *Westbury* was in substance perfectly correct, although in point of form I agree with my noble and learned friend on the woolsack in thinking that that part of the decree which reversed what are there called the findings of the Vice-Chancellor was *ultrà vires*—something which the Lord Chancellor had no power to do.

There is no doubt in this case as to the construction of the specification. It specifies two modes of obtaining the mixture which produces the dyes—one with, and the other without, the agency of heat. It was admitted, on the motion before Lord *Westbury*, and it was also admitted on the hearing of the appeal before your Lordships, that no practical result can be obtained without the heat. This clearly makes the specification bad. It specifies two processes, whereas one only is practicable.

It is no answer to say, as was said at the bar, that any practical workman would know that the cool process was bad, and so would adopt the other. It may be that in construing a specification the Court may sometimes feel justified in understanding the language not according to its ordinary meaning, but in the mode in which it would be understood by skilled workmen called upon to act according to its direction. But this does not warrant us in giving effect to a specification claiming two things, one practicable, and the other impracticable, because a skilful workman would know

that one of them could not be acted upon, and so would confine himself to the other. This would not be to construe a specification according to the language of workmen, instead of according to our ordinary language, but to reject something claimed by the patentee, because a workman would know that it was an impracticable claim.

The Vice-Chancellor found all the issues for the Plaintiffs; what then was the Lord Chancellor to do on a motion for a new trial? The Vice-Chancellor found substantially that the specification was good for the cool as well as for the hot process. But it is admitted that this is not so, and this was admitted before the Lord Chancellor. It was admitted that the cool process produces no particular result. In such circumstances the Court cannot be bound to send back to a new trial a matter which, on the face of it, could obviously lead to no result. The result must be to find the issue as to the specification for the Defendant.

This seems to me to dispose of the whole case. I think, therefore, that the Lord Chancellor was right in declaring the patent to be bad and void in law. I think he was wrong in reversing the findings of the Vice-Chancellor, for he could not do that.

I concur with my noble and learned friend, therefore, in thinking that the course which your Lordships ought to adopt is to affirm the decree upon the first point, reversing it upon the rest. Nothing need be said about the costs, because there has been no litigation.

Decree appealed from, in part reversed, and in part affirmed.

Lords' Journals, 27th July, 1866.

Solicitors for the Appellants: *H. & F. Chester.*

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July 19, 26.

R. C. HICKSON . . . . . APPELLANT;

AND

E. LOMBARD AND J. LOMBARD . . . . RESPONDENTS.

Equity—Jointure—Pleadings—Practice.

6 Ch 564.
13 Ir Eq 100
4 De G J & S 331
4 P.C. 583.
16 Ir Eq 55
8 Ch 1046
10 Ch 112
3 Jeff Cas 124
4 Jeff Cas 396

When pleadings in equity are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the Plaintiff, if he fails in establishing the fraud, to pick out, from the allegations in the bill, facts which might, if not put forward as proofs of fraud, have warranted the Plaintiff in asking, and the Court in granting, relief.

It is the duty of the Judge to determine whether the two are so interwoven with each other, that, on the failure of the proof of fraud, it is impossible to treat the other facts as separate allegations justifying a separate mode of dealing with them.

H. was the tenant of land, under *G.*, on a lease renewable for ever. *L.* and *N.*, and several other persons, held under *H.* on the same terms. *L.* charged his holding with a jointure in favour of his wife. *L.* became embarrassed, and owed money to *N.*, who obtained from him possession of his land, though on what terms did not appear, and then granted him a lease for a year of a portion of it. *H.* was in arrear with his landlord, and all *H.*'s tenants were in arrear with him. *N.* purchased *G.*'s interest in all the lands, and then gave notice to the tenants to pay the arrears, and to take out renewal leases, and pay the fines thereon. These demands were not complied with. *N.* thereon brought ejectment as for forfeiture, recovered judgment, and took possession of all the lands under a writ of *habere*:—

Held, that these circumstances did not raise an equity in favour of the widow of *L.* such as would entitle her to have her jointure declared to be a charge on the lands which *N.* had thus acquired.

THIS was an appeal against a decision of the Master of the Rolls in *Ireland*, which had been affirmed on appeal by the Lords Justices there (1).

Eliza Lombard, the Respondent, claimed to be entitled to a charge, by way of jointure, on certain lands, now held by the Appellant, as the devisee of one *Richard Norris*.

The lands of *Nohoval*, in the county of *Kerry*, belonged in fee to *Trinity College, Dublin*, but had been leased out by that body to a Dr. *Synge*, who granted an underlease of them to two persons named *Gun*. These persons had again underlet them, at improved rents, to various other persons, of whom *Harnett* was one, and

(1) 13 Ir. Ch. Rep. 98.

Æneas Lombard and *Richard Norris* held as under tenants to him. Every lease and sub-lease contained the covenants for perpetual renewal usual in such leases, and known as *toties quoties* covenants. On the 14th of August, 1846, *Lombard*, being about to marry, executed a deed of settlement, by which he assigned the land then in his occupation under the lease, and subject to an annual rent of £129, to trustees, to the use of himself for life, and after his decease in trust for his intended wife (the present Respondent), "in case she should survive him, to pay her out of the rents thereof a sum of £25 a year for her natural life;" and, subject thereto, to the use of his own executors, administrators, and assigns.

This deed was duly registered on the 8th of October, 1846.

The Cause Petition filed by *Eliza Lombard* alleged, that in 1848 *Lombard* fell into embarrassed circumstances; that *Norris* got from him a list of his debts, and, by promising to pay them off, obtained from *Lombard* possession of most of his portion of the lands of *Nohoval*, held under the sub-lease from *Harnett*, leaving *Lombard* only possession of "a house, a kitchen-garden, grass for two cows, some sheep, and half an acre of land for potato garden, and that at that time no rent was in arrear for the said lands;" that by means of false representation *Norris* fraudulently induced *Lombard* to give up possession of the lands, and then used them entirely for his own benefit; that after this *Harnett* fell into arrear with his rent, and became bankrupt, and *Norris* allowed his own rent to get into arrear, and then went to other sub-tenants of *Harnett* and fraudulently got them to deposit money with him under pretence of clearing off the arrears, and so saving the forfeiture; that he applied the moneys so obtained, not in paying off the arrears, but in purchasing the interest of the *Gun* family; and that, "to conceal his fraudulent conduct in that behalf, the said purchase was ostensibly made in the name of his sister, *Ellen Norris*, who lived with him, and had no means of her own whatever; that *Norris* having so purchased the lands and arrears of rent, caused ejectments to be brought, in the name of his sister, against himself and the other tenants and sub-tenants of the lands, and so obtained and took possession of them; that the trustees under the Petitioner's settlement were not made Defendants in any such ejectment; that Petitioner's husband was, in order to avoid being houseless, com-

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pelled to take from *Norris* a lease, as a yearly tenant, at £10 a year, of a portion of the dwelling-house, and a small portion of the land, *Norris* promising *Lombard* grass in summer and hay in winter for two cows, sheep, &c., also a sum of 10*s.* a month; that such sum was paid up to November, 1854, the date of *Æneas Lombard's* death, and for four months afterwards to the Petitioner, but had since then ceased, and the house was allowed to fall into disrepair; that shortly after the death of Petitioner's husband *Norris* called on her, and offered her £200 to release her rights under the settlement, but she refused to do so;" that he made his will, and gave the residue of his property to *Hickson*, who was now in possession of the same; and that he made a codicil, by which he bequeathed to Petitioner "the sum of £150, provided she gives up quiet and peaceable possession of the farm, portion of the lands of *Nohoval* now in her possession," which portion was that previously taken by her husband at £10 a year; that *Hickson* said he would make up the £150 to £200, which she consented to accept on the terms mentioned in the codicil, but he caused a solicitor to prepare a release, which would have made her surrender not only the possession of the lands, but also all right to her jointure. This she refused to execute, and another release was prepared, and then *Hickson* only paid her the £150. That the jointure was now in arrear to the amount of £162 10*s.* That one of the trustees was dead, and the other, being on intimate terms with *Hickson*, would do nothing for her. The Cause Petition prayed that it might be declared that the jointure was well charged on the premises, and for a receiver, and accounts, and for farther relief.

Hickson put in an answer, in which he positively denied any fraud on the part of *Norris* or of himself; and alleged that *Norris* had spent much money on his own portion of the holding under *Harnett*, and was very desirous not to lose it; that *Gun* had taken proceedings against one of *Harnett's* tenants for rent due from *Harnett;* that *Norris* entered into negotiations with *Gun* to purchase *Gun's* interest, that he did purchase it, that the conveyance was made to *Ellen Norris* only as a matter of legal precaution, and under legal advice, and with no view whatever of concealment; that as the rents were universally in arrear, notice was given to the tenants to pay them, and also to pay renewal fines and take

renewals; and as this notice was not complied with, ejectment was brought for the forfeiture, and possession delivered to *Norris* under a writ of *habere*, and he afterwards granted leases to many of the former tenants, but without any reservation of rights to them as under the former leases.

Evidence was taken, and the cause came on before the Master of the Rolls, who thought that the charge of fraud had failed, but that there was in equity a ground of relief made out on the facts; and, being of opinion that *Norris* took the estate subject to the charge which then existed on it, he made a decree in the Petitioner's favour, so far as to declare the jointure a good charge on the estate; but as the Petitioner had improperly alleged fraud, of which there was no proof, he made the decree without costs. The Lord Chancellor and Lord Justice of Appeal confirmed the decision of the Master of the Rolls, on the ground that, "on the face of the Petition there is enough, unencumbered with charges of fraud, to sustain the Petitioner's case."

This was the decree appealed against.

Sir *R. Palmer*, Q.C., and Mr. *Jessel*, Q.C. (Mr. *Hickson*, of the Irish Bar, was with them), for the Appellant:—

The decree of the Court below cannot be sustained. The Cause Petition proceeded on the ground of fraud, which, not being proved, the Petition ought to have been dismissed with costs: *Wilde* v. *Gibson* (1). It had been supposed that that case decided that if a bill proceeded on the ground of fraud, which was not made out, the Plaintiff was in no case entitled to relief on any other ground. But that was carrying the doctrine farther than Lord *Cottenham* had intended. His Lordship, therefore, in the subsequent case of *Archbold* v. *The Commissioners of Charitable Bequests in Ireland* (2), after referring to *Glascott* v. *Lang* (3), thus stated the true doctrine of the Court of equity, that "if fraud be imputed, and other matters alleged, which will give the Court jurisdiction as the foundation of a decree, the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as, under the circumstances, the Plaintiff may be entitled to." Accepting that limitation of the rule, it is sub-

(1) 1 H. L. C. 605. (2) 2 H. L. C. 440. (3) 2 Ph. 310.

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mitted that here no case has been made out which, on any other ground but that of fraud (and the charge of fraud utterly failed), will entitle the Plaintiff to relief.

On this point the Master of the Rolls, in the Court below, entirely mistook the decision in *Montfort* v. *Cadogan* (1), which really has no bearing on the present case. There was not here, as there, any trust which the purchaser of the land was bound to carry into execution, nor were there any trustees who were bound to take care that the renewals were obtained. By the entry of *Norris* into the possession of *Lombard's* estate as a creditor of *Lombard*, he did not become liable to all the trusts to which *Lombard* had subjected the estate in his own hands, *Moore* v. *Greg* (2), where Lord *Cottenham*, in a case of the same kind, said: "The question immediately occurs, why should equity compel a party, whose only connection with the property is that he has taken a piece of parchment as a security for a debt, to put himself in a totally different situation from that which he had intended—namely, to clothe himself with a legal liability to the covenants by taking an assignment of the lease:" and he refused the aid of the Court to produce such a result. *Jones* v. *Kearney* (3) has nothing to do with this case: it merely shews that where a man charges an annuity on lands which he holds under one title, and that title is afterwards defeated, but he acquires the same lands under another title, equity fastens on the new title in order to make him fulfil his contract. Here the new title is not in, or under, the same person who was previously bound, but in one whose interests are not merely different, but opposite. It is not true, therefore, that *Norris*, in whatever way he acquired *Lombard's* interest, but merely because he did acquire it, "stood in *Lombard's* shoes." Relief of the kind here prayed will not be granted in equity on mere assumptions of liability, from having obtained some beneficial interest: *Walters* v. *The Northern Coal Mining Company* (4). There must be something done to shew that the party really became chargeable with the duty of obtaining the renewal, or paying the jointure, but that he neglected that duty, and so occasioned injury to the Petitioner. There is nothing of that kind here.

(1) 17 Ves. 485.
(2) 2 Ph. 717.
(3) 1 D. & War. 134.
(4) 5 De G. M. & G. 629.

Mr. Serjeant *Sullivan* (of the Irish Bar), and Mr. *Horton Smith*, for the Respondents:—

It is not contended that *Norris*, by getting possession of *Lombard's* interest as a creditor only, was bound to renew the lease with *Harnett*, but that obligation did arise when he became a purchaser of that interest. He then took it with all its liabilities. The settlement was duly registered. Registration has, in *Ireland*, the effect of notice to all the world. *Norris* was, therefore, by law, as indeed he was in fact, a purchaser, with notice. That registration is itself sufficient to support the judgment of the Court below. The settlement of 1846 was a settlement of a renewable interest with a *toties quoties* covenant. The trustees of the settlement were entitled to take any money in their hands for the purpose of paying the head rent, and keeping up the lease, but they were actually bound to do so for the purpose of preserving the wife's jointure. That was a trust which flowed from the settlement itself. The registration of the deed is notice to everyone, and is equally so whether the interest purchased is legal or equitable: *Mill* v. *Hill* (1). That case distinctly laid it down that an equity in a grant which is registered will prevail against the right even of a *bonâ fide* purchaser to whom the grantor had subsequently sold part of the property comprised in the registered deed; and it also decided that if a man has a limited interest, and has settled that on a trust, he cannot, by getting a new and extended interest, avoid that settlement. The man who, in reality, obtained his interest, even though obtaining it by purchase, could not do so more than he. The purchaser stands as a trustee for the parties interested under the settlement.

If *Norris* was not bound to renew the lease, he took the property subject to the charge upon it for the jointure, so that, whether he renewed or not, his liability was the same. That liability had been declared by Lord *Manners*, in *Eyre* v. *Dolphin* (2), and the rule was adopted by Lord *Redesdale*, in *Griffin* v. *Griffin* (3), and by Lord Chancellor *Sugden*, in *Jones* v. *Kearney*.

Though the charges of fraud were not distinctly sustained, yet, as the Cause Petition disclosed a clear title to equitable relief on another ground, the decree was justified by the uniform practice

(1) 3 H. L. C. 828. (2) 2 Ball. & B. 290. (3) 1 Sch. & Lef. 352.

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of the Court. The supposed rule in *Wilde* v. *Gibson* (1) has been qualified in *Archbold* v. *The Commissioners of Charitable Bequests in Ireland* (2), and, so qualified, has always since been acted on: *Beale* v. *Billing* (3); *Espey* v. *Lake* (4); and *Parr* v. *Jewell* (5). And in *Best* v. *Brown* (6) a Plaintiff was held entitled to relief on the substance of his bill, but, as he had needlessly introduced charges of fraud which were not proved, it was held that on them, but on them alone, he was liable to costs.

Sir *R. Palmer*, in reply:—

Registration merely gives a registered deed precedence over one which is unregistered, but it cannot make a man a trustee. The Appellant here is only the equitable assignee of the life estate. The real estate is still in the trustees, and, so far as the Appellant is concerned, equity has nothing to fasten on. *Mill* v. *Hill* is, therefore, inapplicable.

26th July. THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, the only difficulty which I feel upon this appeal against the decretal order of the Master of the Rolls in *Ireland*, and against the order of the Court of Appeal affirming the decretal order, arises from the respect which is due to the united opinions of three learned Judges, all agreeing in a view of the case in which I am utterly unable to concur.

The case is altogether of a very unsatisfactory description, and is not calculated to exhibit to much advantage the mode of proceeding in Chancery in *Ireland* by Cause Petition. The statements in the Petition, which are founded chiefly on hearsay, and scarcely at all upon the personal knowledge of the Petitioner, are supported by an affidavit, in which the facts which rest upon hearsay and belief are not at all distinguished from those which might have been within the knowledge of the Petitioner. And upon each of these classes of facts the Master of the Rolls observes: "The Petitioner has thought fit to state matters as if they lay within her own knowledge, which she obviously can know nothing at all about

(1) 1 H. L. C. 605.
(2) 2 Ibid. 440.
(3) 13 Ir. Ch. Rep. 250.
(4) 10 Hare, 260.
(5) 1 K. & J. 670.
(6) 10 W. R. 569.

except from hearsay and belief." And again: "If it was not for the small amount of the matter in dispute, and the expense, I should require her to be examined *vivâ voce*, which I am satisfied would establish that she is not acquainted with the matters to which she deposes as of her own knowledge."

The Petition, which, under these circumstances, can hardly be said to be verified by affidavit, contains charges of fraud against the Appellant, not one of which, in the opinion of all the Judges, was proved. This being the case, they had to decide whether, upon the facts stated in her Petition, the Petitioner was entitled to relief independently of the allegations of fraud which it contained. That was to be decided upon the principle explained by Lord *Cottenham*, in the case of *Archbold* v. *The Commissioners of Charitable Bequests in Ireland* (1), that where a bill alleges matters of fraud, and all the subsequent considerations depend on these matters which are not proved, the Court must necessarily dismiss the bill; "but if fraud be imputed, and other matters alleged which will give the Court jurisdiction as the foundation of a decree, then the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as, under the circumstances, the Plaintiff may be entitled to."

The Court of Appeal thought that the Petition was founded upon an equity independently of fraud. The Lord Chancellor said: "I think that the Master of the Rolls was right in coming to the conclusion that this was not a Petition founded on fraud, but on a substantial equity, in the statement of which the word 'fraud' was used very often." And the Lord Justice of Appeal was satisfied "that it was competent to the Court to disregard the charges of fraud, and to act as the Master of the Rolls has done, on the grounds clearly separate and distinct from the unwarrantable charges of fraud." It appears, however, that the Master of the Rolls advisedly abstained from expressing a conclusive opinion upon this point. He stated that there was considerable difficulty in the case from the charges of fraud being connected with every part of it; and he added, "On the whole, however, I think it is better for me to consider whether, independently of the charges of fraud, the Petitioner would be entitled, on the facts stated and

(1) 2 H. L. C. 460.

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proved, to any relief, and leave the question, as to whether the charges of fraud are so interwoven with the case as to deprive the Petitioner of any right to relief, to be decided upon appeal." With great respect for the Master of the Rolls, I think that the parties were entitled to his judgment upon this point, and that he ought not to have sent it as an original question to the Court of Appeal. The deference which is deservedly due to his judicial opinion might have caused his opinion, if it had been expressed, to be acquiesced in, and have saved all the expense which has been since incurred.

It is not very easy to extract from the case stated in the Petition any separate ground of equity which entitled the Petitioner to relief apart from fraud. But the Master of the Rolls, and the Court of Appeal, having selected certain facts as establishing an equity independently of fraud, it will be necessary shortly to consider the case as it would stand on those grounds alone.

There is no necessity to go back to the dealings with the lease of the lands of *Nohoval*, granted by *Trinity College* in 1761, farther than to the two *Guns*, who hold a sub-lease, with covenants for renewal, and who granted another sub-lease of the whole of the lands to *William Harnett*. *Harnett* granted five separate sub-leases to different persons. The only two necessary to be noticed are one for twenty years to *Æneas Lombard*, the husband of the Respondent, and another to *Richard Norris*, the devisor of the Appellant. *Lombard*, on his marriage with the Respondent, on the 14th of August, 1846, executed a settlement, by which he gave to trustees his farm and lands of *Nohoval* for and during the unexpired residue of the said term of twenty years, "and for and during such farther and other term of years that may be granted thereof," "pursuant to the *toties quoties* clause or covenants for the renewal thereof," to the use of himself for life, and from and after his decease to the use that his intended wife (the Respondent) surviving should have and receive an annuity of £25, to be issuing out of, and charged upon, the said farm, lands, and premises.

Lombard and his wife occupied the farm till 1848 or 1849, when *Lombard*, being in embarrassed circumstances, his cattle were seized under an execution, and it is alleged that *Richard Norris* offered to pay off the debts, and to have a portion of *Nohoval*

given up to him till he was repaid. It is alleged that upon this promise *Norris* obtained from *Lombard* the possession of his farm, except the house, kitchen-garden, grass of two cows, some sheep, and half an acre of land for a potato garden. *Harnett*, who held under the *Guns* as before-mentioned, had fallen considerably into arrear for his rent, and was liable, in consequence, to be evicted. It is alleged in the Petition that *Norris* went about to the different tenants, and procured from them various sums of money under pretence of paying the rent in arrear to prevent the loss of their sub-leases by the forfeiture of *Harnett's* lease; and that he never applied the money so obtained to that purpose, but used it in purchasing the interest in the lease to the *Guns*, under whom *Harnett* held. There is no proof of this allegation; and the only fact in evidence is, that on the 18th of December, 1850, a conveyance was executed by the *Guns* to *Ellen Norris*, as trustee for *Richard Norris*, of all their interest in the lands of *Nohoval*, for the sum of £1107 13*s.* 10*d.*

Norris, afterwards having served a notice to quit on *Harnett*, brought an ejectment in the name of his trustee, *Ellen Norris*, against himself and *Lombard*, and the other tenants of the lands of *Nohoval*, and obtained possession under a writ of *habere facias*. He afterwards made a lease to *Lombard*, at the yearly rent of £10, of the portion of the land which *Lombard* was allowed to occupy when *Norris* entered into possession, upon the occasion of the execution on the farm. Mrs. *Lombard* afterwards gave up this lease upon receiving a sum of £150 from the Appellant, which was bequeathed to her by a codicil to the will of *Richard Norris*, on condition of her giving up quiet and peaceable possession.

Upon these facts the Master of the Rolls first, and afterwards the Court of Appeal, held that, *Lombard* having been permitted by the trustees of his settlement to remain in possession, he was bound to pay the rent and fines in order to preserve the lease; and that, when *Richard Norris* entered into possession as a creditor of *Lombard* (to use the words of the Lord Chancellor), "he stood in *Lombard's* shoes," and, having full notice of the settlement, it was his duty to pay the proportion of the renewal fines payable out of the part of which he was in possession. In the argument for the Respondent at your Lordship's bar this proposi-

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tion was pushed to a greater extent. It was said that the marriage settlements of the *Lombards* being registered, the registration was notice to all the world, and bound every one in possession of the land (no matter how or under what circumstances that possession was acquired) to preserve the right of renewal.

It seems to me to be impossible to push the liability of *Norris* to this extent. I quite agree that if he had possessed himself of the whole interest of *Lombard*, whether legal or equitable, and, *à fortiori*, if he had obtained possession of it by fraud, he could not deal with the property in any way so as to prejudice the right of renewal which attached to that interest. He could not, therefore, supposing such a state of things, by purchasing *Gun's* interest, and enforcing the forfeiture of *Harnett's* lease, put an end to *Lombard's* right of renewal. There is, however, no evidence of the nature of *Norris's* possession, and, certainly, nothing to shew that it was acquired by fraud. All that appears is, that he was permitted to occupy a portion of the farm held by *Lombard*, and to place his cattle thereon, which certainly is insufficient to impose a liability upon him to keep up the renewal of the lease. If, as the Lord Chancellor supposes, *Norris* has represented the whole interest in *Lombard's* portion of *Nohoval*, the consequence which the Courts below drew, that he was bound to renew, might have been a legitimate one; but in the absence of all proof of such a possession by *Norris*, it cannot properly be adopted.

I am, therefore, of the opinion that the decrees of the Master of the Rolls, and of the Court of Appeal, ought to be reversed.

LORD CRANWORTH:—

My Lords, in this case, if *Lombard* had himself purchased the reversion, he could have done so only for the benefit of those interested in the settlement. The same doctrine would affect any one purchasing his interest with notice of the settlement. The Cause Petition alleges, in substance, that *Norris* became equitable mortgagee with notice of the settlement; so that, when he purchased the reversion from the family of the *Guns*, he must be taken to have done so for the benefit of those interested in the settlement.

This is the foundation of the decree below, which is right if

the case is properly raised by the pleadings, and if the allegation as to *Norris* having become equitable mortgagee is made out in proof. But is it made out? The proof on this point rests, first, on the affidavit of the Petitioner verifying her Petition. This, however, is insufficient to support her case; for, even if it could be taken to prove that *Norris* had possession of the lands, it affords no proof that he had been let into possession under a contract that he should hold them as a security for the advances he had made. The existence of any such contract depends on certain conversations alleged to have taken place between *Æneas Lombard* and *Norris;* but the Respondent *Hickson* does not believe that any such conversations took place, and there is no evidence sufficient to establish their existence. It is true that the Petitioner repeats in her affidavit the allegations in her Petition; but she does not say that she was present at any such conversation, or explain how she knows that any arrangement was made giving to *Norris* the right to hold as mortgagee in possession. I think, therefore, that she fails in proving anything, except so far as we can give credit to her statement that from the year 1849 *Norris* had possession of the whole of the lands, except the house and gardens.

I think there is proof that *Norris* knew of the existence of the settlement, for it was found by *Hickson* in his possession, which may be presumed to have been because it was among the papers of *Norris,* his testator. So far, therefore, as notice of the nature of the title of *Æneas Lombard* is material, I think it must be considered that the Petitioner had made out her case.

But notice of the nature and extent of the interest of *Æneas Lombard* is not important, unless it is shewn that the possession of *Norris* is to be attributed to a transfer, or an agreement for a transfer, of that estate and interest to him. And this is not established to have been the case. The possession of the land by *Norris* may have been by mere permission from *Lombard.* The circumstances make it not improbable that he had some interest, legal or equitable, beyond that of mere permission by *Lombard.* This, however, is not by any means a necessary consequence of his possession, even assuming it to be clear that he was possessed of the settlement; and, therefore, as the burthen of

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proof was on the Petitioner, and as I think she failed to establish such proof, she failed to make out a title to relief.

This being the conclusion at which I have arrived, it is unnecessary to consider whether the pleadings do, or do not, properly raise the question on which the Court below proceeded. It was argued that no such case is made by the bill, and that the relief there asked is grounded solely on certain frauds on the part of *Norris*, alleged but not proved. Though the question does not in this case call for any decision, I yet feel bound to say that I subscribe most readily to the doctrine that, where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the Plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the bill facts which might, if not put forward as proofs of fraud, have yet warranted the Plaintiff in asking for relief. A Defendant, in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward. If, indeed, relief is asked alternatively, either on the ground of fraud, or, failing that ground, then on some other equity, a Plaintiff may fail on the first but succeed on the latter alternative. But, then, the attention of the Defendant has been distinctly directed to it, and he has been called on to answer the case according to both alternatives. There is nothing of this sort in the pleading of this case; and whether the facts alleged are so alleged as to preclude the Petitioner from insisting on any ground for relief except fraud, is a point on which, for the reasons I have stated, I do not feel called on to give any opinion.

My opinion is, that the decree, as well of the Lords Justices as of the Master of the Rolls, ought to have been a dismissal of the Cause Petition with costs.

Decretal Orders appealed from reversed, with a declaration that the Cause Petition ought to have been dismissed with costs in the Court below.

Lords' Journals, 26th July, 1866.

Solicitors for Appellant: *E. D. Stokes (Dublin); Cruse.*
Solicitors for Respondents: *Moriarty (Dublin); D. Keane.*

MATTHEW CURTIS AND ANOTHER . . . . APPELLANTS;
AND
JOHN PLATT AND OTHERS . . . . . RESPONDENTS;
Et e contrà.

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May, 29, 31;
June 1, 4, 7;
August 7.

Chancery Appeal—Order—21 & 22 *Vict. c.* 27.

The 3rd section of the 21 & 22 Vict. c. 27 (*Chancery Amendment Act*, 1858), does not, by reference to proceedings at Common Law, impose limits upon the right of appeal previously existing against any order made in the Court of Chancery. Where, therefore, an order had been made in the Court of Chancery by a Vice-Chancellor, on his own findings, upon a trial without a jury, and that order had been confirmed by the Lord Chancellor on appeal:—

Held, that the order of the Lord Chancellor was the subject of appeal to this House.

THIS was an appeal against a decree of Lord Chancellor *Westbury*, which had affirmed a previous decree of Vice-Chancellor *Wood*.

The Appellants were the assignees of a patent which had been granted in 1854 to *John Wain*, for "improvements in certain machines for spinning and doubling cotton, of the kinds commonly known as mules and twiners." On the 28th of April, 1863, the Appellants filed their bill against the Respondents for an alleged infringement of their patent, praying for an injunction and for farther relief. On the 11th of June, 1863, the motion for an injunction was made, and it was agreed to be treated as a motion for a decree, to be heard after a trial which was fixed to take place before the Vice-Chancellor, without a jury, on five issues: 1. Whether the invention was new. 2. Whether it was a new manufacture. 3. Whether the specification particularly described and ascertained the nature of the invention. 4. Whether it was useful. And 5. Whether the Respondents had been guilty of infringement. The trial occupied four days in July, and on the 6th of November Vice-Chancellor *Wood* delivered judgment, finding the first, second, third, and fourth issues for the Appellants, and the fifth issue for the Respondents. Notice of appeal to the Lord Chancellor was given, to the effect that he would be pleased to declare that the finding or judgment

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of the Vice-Chancellor upon the fifth issue ought to have been for the Appellants; that it might be so entered; or that a new trial might be had, &c. The Respondents gave notice of a cross-motion, praying for a reversal of the Vice-Chancellor's findings on the first four issues, or for a new trial as to them. In January, 1864, these motions were heard by the Lord Chancellor, who affirmed the finding of the Vice-Chancellor on the fifth issue, and a final decree was pronounced in February, 1864, which, in form, affirmed all the findings of the Vice-Chancellor. This was the decree appealed against. The "Reasons" of the Appellants asserted the incorrectness of the Lord Chancellor's decree with regard to the fifth issue of fact. The first "Reason" of the Respondents raised a preliminary objection to the competency of the appeal, on the ground that it was dependent on matters of fact, upon which the verdict of the Judge, in the absence of a new trial, were conclusive. The other questions raised, being all dependent on the question of infringement or no infringement, do not require notice.

Mr. *Grove*, Q.C., and Mr. *G. M. Giffard*, Q.C. (Mr. *Cracroft Fooks* was with them), for the Respondents, contended that this appeal was not competent. The provisions of the *Chancery Amendment Act* of 1858 (21 & 22 Vict. c. 27), by the 3rd section (1), gave to the Court of Chancery power to assess damages, and to try questions of fact, and for those purposes conferred upon it all those powers which, in such a case, belonged to a Court of Law. Following that definition of the powers of the Court of Chancery, it was clear that this, which was an appeal upon a finding of fact, would not lie. The *Common Law Procedure Act* of 1854 introduced the practice of appeals on motions for new trials, but by the 35th section, while allowing it under special restrictions in cases where the motion was made on the ground that the Judge had not ruled according to law, it expressly provided, that where the application for a new trial was "on a matter of discretion, as on the ground that the verdict was against the weight of evidence," no such appeal should be allowed. This was exactly a case of that sort.

(1) See *Fernie* v. *Young*, *ante*, p. 63; see also *Simpson* v. *Holliday*, *ante*, p. 315.

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[LORD WESTBURY:—The proviso at the end of the 3rd section of the Act of 1858 says that, "from any order made by the Court, on an application for a new trial, there shall be the same right of appeal as from any other order of the Court." Here an order has been made, and the appeal is against that order.]

But that section relates to trial before a jury, where an order made by the Court would resemble the order made in former times upon the return of a verdict on an issue tried at law. That section does not give an appeal to the Court of Appeal in Chancery. The 5th section refers to a trial before a Judge without a jury, and gives a party the power to apply for a new trial "either to the Judge before whom the trial was had, or to the Court of Appeal in Chancery," but does not give the general appeal against an Order of the Court, as in the preceding section.

[LORD WESTBURY:—In Chancery no distinction exists, as to the power of appealing, between an appeal on a question of law and an appeal on a question of fact.]

That is according to the old practice of the Court; but here is a new jurisdiction created by statute, and the exercise of that jurisdiction is regulated and restricted by reference to the practice at law.

[LORD WESTBURY:—The statute did not enlarge the jurisdiction of the Court, but enabled the Court of Chancery to do what it was before obliged to get another Court to do for it.]

But by the statutory reference to the proceedings at common law, the mode of proceeding in this new exercise of its jurisdiction must be according to the practice at common law. If so, then here, the appeal being only on a question of fact, and no new trial having been granted, the Order of the Court is not subject to appeal.

Mr. *Rolt*, Q.C., and Mr. *Webster*, Q.C. (Mr. *Drewry* was with them), for the Appellants, in answer to the preliminary objection:—

The general words of the proviso at the end of the third section are sufficient to sustain the right of appeal. Besides which, the Appellants here complain of what would, if the matter had been

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tried before a jury, have amounted to a misdirection; namely, the opinion which led to the finding of no infringement, which finding must have proceeded on the construction put by the Court below on *Wain's* patent; for as to the fact of the resemblance between the two machines, the Appellants submit that there could be no doubt. Here was an order of the Court, founded on a trial, and "any order" was, by the third section, as it was by the settled practice of the Court of Chancery, subject to appeal.

THE LORD CHANCELLOR (Lord *Chelmsford*), having stated the facts of the case, said:—

Before the consideration of this question of infringement, however, it is necessary to dispose of a preliminary objection which was raised as to the competency of the appeals. The Counsel for the Respondents contended that the *Chancery Amendment Act*, 1858, empowering the Court of Chancery to try questions of fact, either by a jury, or before the Court itself without a jury, places that Court, upon applications for new trials, exactly on the same footing as the Courts of common law, and that by the 35th section of the *Common Law Procedure Act*, 1854, upon an application for a new trial in those Courts in a case like the present, no appeal would be allowed.

It is extremely inconvenient that questions of fact, or of mixed law and fact, upon such intricate and difficult subjects as the infringement of patents generally involves, should be brought to this House by appeal, because the Judge who tries the case will generally have a much better opportunity of forming a judgment upon the merits than your Lordships can possibly have. This case affords a good illustration of that remark. In the Court below the models of the machines were produced, and were explained *vivâ voce* by the several scientific witnesses who were called, and the Vice-Chancellor was enabled, by questioning them himself, to remove any difficulty which lay in his way, and to obtain all the information necessary to his complete comprehension of the subject. It is quite an exceptional circumstance that the models of the different machines were brought for your Lordships' inspection in this case. The machines were of such a complicated nature that it was considered almost impossible to

understand the questions raised by the appeal without an ocular examination and comparison of them. But, inconvenient and unsatisfactory as the discussion of such cases before an appellate tribunal must be, the words of the *Chancery Amendment Act*, 1858, are too clear and plain to admit of a construction which will take away an appeal. By the 3rd section of the Act, which gives the trial by a jury, it is expressly provided, that "from any Order made by the Court upon an application made for a new trial, there shall be the same right of appeal as from any other order of the Court." It was said that this proviso was confined to the case of a trial by a jury, and did not extend to a trial before the Court without a jury, which is the subject of the 5th section. That section provides that, in case of such a trial, any person may apply for a new trial, either to the Judge before whom the case was tried, or to the Court of Appeal in Chancery. It was contended that the appeal given in this particular case was limited, and different from the general right of appeal contained in the 3rd section. But it appears to me that the proviso in the 3rd section embraces all applications for new trials, however the case may have been tried. Where the trial is by a jury, an application may reasonably and properly be made to the Judge for a new trial, upon an alleged erroneous finding; but where a trial takes place before the Court itself, although, if the finding involves a matter of law, it may not always be useless to subject the question to the deliberate reconsideration of the same Judge who has previously decided it, yet, where it is a question purely of fact, it would generally be hopeless to expect the Judge to reverse his own finding, and therefore a power is given to the losing party to apply either to the Judge who tried the case, or to the Court of Appeal, for a new trial. The Court of Chancery knows no distinction between orders founded upon questions of law and those upon matters of fact; and the words of the 3rd section applying generally to any orders made upon an application for a new trial, and there being nothing in the 5th section which can be considered as creating any distinction between the different kinds of trial, whether with or without a jury, the regular course of appeal in both cases must equally be open to the parties, and therefore the present appeal is not incompetent.

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[His Lordship then discussed the question of infringement, and concluded by expressing his opinion that the decree appealed from ought to be affirmed, and the appeal dismissed with costs.]

LORD CRANWORTH, after entering minutely into the nature and operations of the two machines, expressed his entire concurrence with the judgment of the Court below, and with the motion of his noble and learned friend on the woolsack. His Lordship added:—When my noble and learned friend Lord *Westbury* left the House, he intimated to us that he could not attend here when the case was considered; but that, having attended during the whole of the argument, he had heard nothing to shake the opinion which he had previously entertained in the case.

Decree of the Court below affirmed. Original appeal dismissed with costs. Cross appeal (by consent) dismissed without costs.

Lords' Journals, 7th August, 1866.

Solicitors for the Appellants: *Bower, Sons, & Cotton.*
Solicitors for the Respondents: *N. C. & C. Milne.*

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ANNUITY: *See* BANKRUPTCY, 6.

APPEAL: *See* PRACTICE.

BANKRUPTCY—1. The 90th section of the *Bankrupt Act* (24 & 25 Vict. c. 134), 1861, is to be construed as a remedial enactment. *Williams* v. *Harding* 9

2. Under that section, therefore, no debt incurred by a non-trader is sufficient to found an adjudication of bankruptcy against him, unless it was contracted by him after the period at which the contracting of debts by a non-trader made him liable to the bankrupt laws, namely, after the passing of the *Bankruptcy Act*, 1861. *Id.*

3. Liability to the debts of a joint-stock company incurred in 1849 by a person then becoming a shareholder of the company, and signing the deed of settlement, which expressly created that liability, made him a debtor at the moment the debts were contracted by the company; and calls made on him in 1862 and 1863 (under the authority of a winding-up order) to pay money in respect of those debts, did not themselves constitute a "debt contracted after the passing of the Act 1861," but amounted merely to an enforcement of the liability incurred when he became a shareholder. *Id.*

4. Under the 11 & 12 Vict. c. 45, and the 12 & 13 Vict. c. 108, the official manager to whom calls are ordered to be paid does not in virtue of such order become a creditor of the person who has to pay the calls, so as to be entitled to be a petitioning creditor, and to ask for an adjudication in bankruptcy against him. *Id.*

5. A covenant to pay recurring premiums on a life policy is an absolute covenant, and does not constitute "a liability to pay money upon a contingency," within the meaning of the 178th section of 12 & 13 Vict. c. 106. The only contingency being that of the continuance of the life insured, it is an absolute covenant to pay, not upon, but until, the happening of a certain event, so that the contingency specified does not create, but puts an end to the liability. *Mitcalfe* v. *Hanson* 242

6. The statute contemplated only one single liability arising upon one contingency, and that cannot apply to a liability to make periodical payments, nor is there any provision in the statute which gives such a liability the character of an annuity. *Id.*

BOARD OF TRADE: *See* CHEAP TRAINS.

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BUILDING : *See* EQUITY.

CALLS: *See* BANKRUPTCY, 3, 4.

CANAL—1. The *S. & W. Canal* was formed under an Act of Parliament. Two years afterwards, another Act passed authorizing the formation of the *B. Canal*. This latter Act contained provisions requiring the *B. Company* to make a "communication" between the *B.* and the *S. & W. Canals* at *A.*, and gave the *S. & W. Company* power to make this communication if the *B. Company* should not make it within a given time. It was made by the *S. & W. Company* under an agreement executed between the two companies, which appointed commissioners for the purpose. As then formed, the communication was effected by twenty locks. Some years afterwards, the *B. Company* improved the communication and saved much water by substituting, at one particular spot, two locks for one. A consolidating Act was passed (5 Will. 4, c. xxxiv.), which contained in the 15th section provisions enabling the *B. Company* (the proprietors of several canals), to "raise the water of the canals from one level to another," by reservoirs and machinery, &c. The 83rd section, with a view to preserve the communication at *A.*, forbad the *B. Company* to use water from or out of the *W.* level (which was the highest level of the *B. Company* —the communication at *A.* being 132 feet below it) for any purpose whatever, when the depth of water in the lowest lock of the *B.* communication should stand at less than three feet perpendicular, to be reckoned from the sill of an upper gate in the *S. & W. Canal* adjoining thereto, and in case of breach of this prohibition, and consequent injury to the *S. & W. Company*, directed that any damages sustained should be assessed by a jury. The 258th section prohibited the *B. Company* from doing anything to obstruct the navigation of the *S. & W. Canal*, or, "in any wise to shorten or vary all or any of the *B. Company's* canals, so as thereby to impede the navigation of the *S. & W. Canal*," without the consent of the *S. & W. Company*. By the interpretation clause the word "canal," was to include "communications." The *B. Company* recently proposed to construct machinery which should pump back some of the water coming from the *W.* level, and so would affect the supply to the *S. & W. Canal*, but would not prevent the existence and free use of the communication at *A.* The *S. & W. Company* filed a bill to prevent the construction of this machinery, alleging that it was contrary to the intention of the Legislature as shewn in the various Acts, and to the deed of arrangement; and also contrary to the right which must now be taken as vested in the *S. & W. Company* by user and prescription :—

Held, affirming the decision of the Lords Justices, that the bill must be dismissed. *Staffordshire, &c. Canal* v. *Birmingham Canal* .. 254

2. *Held*, also, that the powers granted by the Acts were granted for specific purposes, which were those of making and maintaining a free communication between different places by navigable canals; and that the ordinary doctrines as to the permissive use of water did not apply in such a case, and that no grant could be made by the *B. Company* of the use of any water which might injuriously affect those purposes. That consequently no right by prescription could, in this case, have any foundation in grant. *Id.*

3. Nor could any prescriptive right by user be founded on the fact that the *B. Company* had, for many years, allowed the water to pass out of the *B. Canal* in a particular manner, so as to prevent the *B. Company* from afterwards improving its machinery and economising the water, for the water so passing into the *S. & W. Canal* did not constitute a stream or watercourse within the meaning of the *Prescription Act*, 2 & 3 Will. 4, c. 71. *Id.*

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4. And, *held*, that the object of the communication being fully secured, the proposed works were not an impeding or obstructing of the *S. & W. Canal*, such as was prohibited by the Act. *Staffordshire, &c. Canal*, v. *Birmingham Canal* 254

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CHARITY: *See* LEGACY DUTY.

CHEAP TRAINS—1. The approval of the Board of Trade to the running of a particular line of cheap trains is necessary in order to exempt that line from passenger traffic duty.

The 7 & 8 Vict. c. 85, requires cheap trains to be run on every line of railway under certain conditions, performance of the first condition being expressly subjected to the approval of the Board of Trade. There were other conditions, one of which was, that the cheap train fares should not exceed one penny per mile. The Board had power to dispense with any of the conditions except this one. The 9th section declared that "No tax shall be levied on the receipts from the conveyance of passengers at fares not exceeding one penny for each mile." Trains were run by a railway company at those fares, but those trains had not received the approval of the Board of Trade:—

Held, that the duty was payable on those cheap trains. *The Great Western Railway Company* v. *The Attorney-General* 1

COMPULSORY POWERS—1. Where persons have special powers conferred on them by Parliament for effecting a particular purpose, they cannot be allowed to exercise those powers for any purpose of a collateral kind. Therefore, a company authorized (making due compensation) to take compulsorily the lands of any person for a definite object, may be restrained by injunction from any attempt to take them for another object. *Galloway* v. *The Mayor, &c. of London* .. 34

2. Where the Legislature has conceded power to a body of adventurers for a certain purpose (as for example the formation of a railway) such a body must shew some ground for the concession, and the Legislature has no concern with its means for obtaining the funds to carry its declared objects into effect, and in order to effect them it must not exceed the limits of its powers. But the case is different where an existing public body, such as the corporation of a city, is entrusted by the Legislature with the duty of making public improvements in its city, and the powers thus entrusted to it for such a purpose will not be subject, as in the other case, to a strict and restrictive construction. *Id.*

3. Where, therefore, the mayor and commonalty of the city of *London* had been entrusted with powers to make certain public improvements in the City, and for that purpose had been authorized compulsorily to take land, to raise money on the credit of it, and to sell *superfluous* land to pay off the debt, the Act which gave them those powers, though only thus impliedly, authorizing them to take more land than might be absolutely necessary to effect the desired improvements, might be construed favourably to them, and lands so taken might be treated as lands taken "for the purposes of the act." *Id.*

4. A contract made by the Mayor, &c. with another body to obtain lands under the Act, and to sell such lands to that other body as soon as it had passed, would not be illegal. *Id.*

5. Before the royal assent was given to an Act of this description the mayor and commonalty entered into a contract with a railway company to sell to the company certain lands which the mayor and commonalty expected to be authorized by the Act to take. When the Act had been passed, notice to take the land was given, and the taking was resisted by the land owner. A subsequent Act recited the con-

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tract, and declared the company entitled to the benefit of it. Notice to take the land under this later Act was given by the mayor and commonalty to the land owner, but the notice expressly reserved to them all their rights under the former Act:—

Held, that the original contract was valid, and that this later Act was a parliamentary recognition of it. *Galloway* v. *The Mayor, &c., of London* 34

COMPROMISING A FELONY: *See* FELONY.

CONTINGENT (DEBT OR LIABILITY: *See* BANKRUPTCY, 3, 4, 5, 6). (DEVISE: *See* WILL, 5.)

CONTRACT: *See* COMPULSORY POWERS, 4, 5.

CORPORATION—1. Acts giving to a corporation compulsory powers for the purpose of effecting public improvements are not to be construed in the same strict manner as Acts giving like powers to any body of adventurers, such for example as a railway company. *Galloway* v. *The Mayor, &c., of London* 34

2. The principle on which a private person, or a company, is liable for damages occasioned by the neglect of servants, applies to a corporation which has been entrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person, or the company, are not applicable to the use of the individual corporators or to that of the corporation, but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls themselves are to be proportionably diminished. *Mersey Docks* v. *Gibbs*. *Same* v. *Penhallow* . 93

3. *Parnaby* v. *The Lancaster Canal Company* (11 A. & E. 223), which was the case of an ordinary company, approved of, and the principle of liability for negligence there established, applied to a corporate body entrusted by statute with the performance of a public duty and receiving therefrom no profits or emoluments for itself.

4. If knowledge of the existence of a cause of mischief makes persons responsible for the injury it occasions, they will be equally responsible when, by their culpable negligence, its existence is not known to them. *Id.*

DAMAGES: *See* DOCKS.

DEBT CONTINGENT: *See* BANKRUPTCY, 3, 4, 5, 6.

DECREE: *See* ENROLMENT; PRACTICE.

DEED: *See* PARCEL.

DEVISE: *See* WILL.

DOCKS—1. The principle on which a private person, or a company, is liable for damages occasioned by the neglect of servants, applies to a corporation which has been entrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person, or the company, are not applicable to the use of the individual corporators, or to that of the corporation, but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls themselves are to be proportionably diminished. *Mersey Docks* v. *Gibbs*. *Same* v. *Penhallow* .. 93

2. *Parnaby* v. *The Lancaster Canal Company*, which was the case of an ordinary company, approved of, and the principle of liability for negligence there established, applied to a corporate body entrusted by statute with the performance of a public duty and receiving therefrom no profits or emoluments for itself. *Id.*

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3. If knowledge of the existence of a cause of mischief make persons responsible for the injury it occasions, they will be equally responsible when, by their culpable negligence, its existence is not known to them. *Mersey Docks* v. *Gibbs*. *Same* v. *Penhallow* 93

DUTIES: *See* PASSENGER TRAFFIC DUTY.

ENROLMENT OF A DECREE—In a case where a trial takes place in Chancery, if a decree made upon the findings is, by one party, enrolled before the time for having a new trial expires, the other party is not thereby prevented from moving for a new trial. *Fernie* v. *Young* .. 63

EVIDENCE: *See* PARCEL.

EQUITY—1. If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of equity will not afterwards allow the real owner to assert his title to the land. *Ramsden* v. *Dyson* 129

2. But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it. *Id.*

3. So, if a tenant builds on his landlord's land he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined. *Id.*

4. If the tenant, being a mere tenant at will, builds on the land in the belief that he thereby acquires a title afterwards to claim a lease of the land, and the landlord allows him so to build, knowing that he is acting in that belief, and does not interfere to correct the error, *Semble*, that equity will interfere to compel the grant of a lease. *Id.*

5. *Quære*, whether an agent, having authority to let lands, can bind his principal by a stipulation that in certain events the tenant shall be entitled to have a lease upon certain terms. *Id.*

6. If a principal knows that a stranger is dealing with his agent under the belief that all statements made by the agent were warranted by the principal, and, so knowing, allows the stranger to expend money in that belief, *Semble*, that a Court of equity would not afterwards allow the principal to set up want of authority in the agent. But this knowledge must be brought home to the principal. *Id.*

7. *T.* took a piece of land belonging to *R.*, from *R's* agent, by parol agreement; it was known to all parties that the land was to be built upon. A ground rent was fixed at £4. *T.* laid out £1800 in building. *T.* afterwards made a written application to *R's* agent for another piece of land, also for the purpose of building on it. In this application *T.* declared himself willing to take the land as "tenant at will." The land was allotted to him, and the rent fixed at £1 0*s.* 7*d.* When buildings were erected on the land the persons who had so taken the land were entered in *R.'s* rental books as tenants. It was admitted on all sides that where such takings were made the tenants would never be disturbed while the ground rent fixed as above described was paid. When the tenant desired to transfer the land to another person, notice was given to the agent, and the entry of the name of the tenant in the books of rental kept by the agent was altered. In many cases the form of proceeding was, that the land was surrendered to the landlord, and the new tenant was accepted, much after the form of a transfer of copyhold. The tenancies were very numerous. *T.* alleged that there was believed to exist, and that *R.'s* agents had, by their words and conduct, encouraged such belief,

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a "tenant right tenure" on the estate, that a person who had so taken and built upon *R's* land was entitled at his pleasure to become a leaseholder, and to demand the grant of a lease for sixty years, renewable every twenty years on payment of a fine equal to double the annual ground rent. Such leases had been granted, but there was no direct evidence of their being granted on any such claim of right; there was, however, evidence that a railway company, being desirous of obtaining some of these pieces of land held under parol agreement on the payment of a ground rent, had refused to purchase them unless such leases were granted, and that in fact such leases were granted, and then the tenants received compensation for their buildings:—

Held (*diss.* Lord *Kingsdown*), reversing the decision of the Court below, that these circumstances did not shew the existence of anything greater than a tenancy from year to year, and did not establish any title to compel the grant of a lease, and, consequently, that the landlord having brought ejectment against *T.*, equity could neither interfere to compel the grant of a sixty years' lease, nor to stay the ejectment. *Ramsden* v. *Dyson* 129

8. *Per* Lord *Kingsdown.*—If a man, under a verbal agreement with a landlord for a certain interest in land, or under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and, upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. *Id.*

9. When pleadings in Equity are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the Plaintiff, if he fails in establishing the fraud, to pick out, from the allegations in the bill, facts which might, if not put forward as proofs of fraud, have warranted the Plaintiff in asking, and the Court in granting, relief.

It is the duty of the Judge to determine whether the two are so interwoven with each other, that, on the failure of the proof of fraud, it is impossible to treat the other facts as separate allegations justifying a separate mode of dealing with them. *Hickson* v. *Lombard* .. 324

10. *H.* was the tenant of land, under *G.*, on a lease renewable for ever. *L.* and *N.*, and several other persons, held under *H.* on the same terms. *L.* charged his holding with a jointure in favour of his wife. *L.* became embarrassed, and owed money to *N.*, who obtained from him possession of his land, though on what terms it did not appear, and then granted him a lease for a year of a portion of it. *H.* was in arrear with his landlord, and all *H.'s* tenants were in arrear with him. *N.* purchased *G.'s* interest in all the lands, and then gave notice to the tenants to pay the arrears, and to take out renewal leases, and pay the fines thereon. These demands were not complied with. *N.* thereon brought ejectment as for forfeiture, recovered judgment, and took possession of all the lands under a writ of *habere*:—

Held, that these circumstances did not raise an equity in favour of the widow of *L.* such as would entitle her to have her jointure declared to be a charge on the lands which *N.* had thus acquired. *Id.*

FELONY—1. A son carried to bankers of whom he, as well as his father, was a customer, certain promissory notes with his father's name upon them as indorser. These indorsements were forgeries. On one occasion the father's attention was called to the fact that a promissory note of his son with his (the father's) name on it, was lying at the bankers dishonoured. He seemed to have communicated the fact to the son, who immediately redeemed it; but there was no direct evi-

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dence to shew whether the father did or did not really understand the nature of the transaction. The fact of the forgery was afterwards discovered; the son did not deny it; the bankers insisted (though without any direct threat of a prosecution) on a settlement, to which the father was to be a party; he consented, and executed an agreement to make an equitable mortgage of his property. The notes, with the forged indorsements, were then delivered up to him:—

Held, that the agreement was invalid. *Williams* v. *Bayley* .. 200

2. A father appealed to, under such circumstances, to take upon himself a civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with a moral certainty of a conviction, even though that is not put forward by any party as the motive for the agreement, is not a free and voluntary agent, and the agreement he makes under such circumstances is not enforceable in equity. *Id.*

FOREIGN JUDGMENT—The law of the domicile of a deceased person governs the succession to his personal property.

Where, therefore, in a foreign Court, upon the death of a person domiciled in the country where that Court had jurisdiction, *C.* claimed to be the natural son of *H. C.*, deceased, and as such natural son to be entitled by the law of that country to inherit his father's property, and alleged that his father was of a particular station in society (a circumstance which allowed of such a claim by a natural son), and that the father had died domiciled in the country, and had died intestate, and the foreign Court found all these allegations in his favour:—

Held, that the Probate Court in this country was bound by the judgment of the foreign Court, and had, therefore, rightly admitted *C.* to be heard as contradictor to a will, set up in this country as having been made by *H. C.*, disposing of his personal property here. *Doglioni* v. *Crispin* 301

FRAUD: *See* EQUITY; PLEADING.

GIFT, ORIGINAL AND CONTINGENT: *See* WILL.

ISSUE OUT OF CHANCERY—No issue can be directed out of Chancery to try the preliminary legal right on which a title to relief in Chancery may depend. The trial "shall" (under the *Chancery Act*, 1862), be decided in the Court itself. *Fernie* v. *Young* 63

JOINT TENANTS: *See* WILL.

JOINTURE: *See* EQUITY, 9.

KNOWLEDGE: *See* DOCKS, 3; EQUITY, 5, 6.

LEASE: *See* EQUITY.

LEGACY DUTY—The Stamp Acts applicable to *Ireland* exempt from duty any legacy given for a purpose merely charitable. They define a legacy to be "any gift, by any will or testamentary instrument of any deceased person, which, in virtue of any such will, shall have effect," &c. *B. F.*, by will, gave the residue of her estate, of what nature soever, to two persons, *D.* and *M.* On the day on which she made her will, she wrote letters to them explaining to them that she intended the money bequeathed to be applied to a certain charitable purpose, and she relied on their honour and integrity to fulfil her wishes. In her lifetime they accepted the trust thus imposed on them by these letters:—

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Held, that the will itself not shewing a charitable purpose, but appearing on the face of it to create a bequest in favour of two individuals, the legacy did not come within the terms of the exemption, but was liable to duty. *Cullen* v. *The Attorney-General for Ireland* 190

LIABILITY, CONTINGENT: *See* BANKRUPTCY, 3, 4, 5, 6.

MISDIRECTION: *See* PARCEL OR NO PARCEL; PRACTICE.

NEGLIGENCE: *See* DOCKS.

NEW TRIAL: *See* PRACTICE.

The enrolment by one party of a decree made upon findings on a trial in Chancery, will not prevent the other party from moving for a new trial, if the time for making such motion has not expired. *Fernie* v. *Young* 63

NEXT OF KIN: *See* PRACTICE.

OFFICIAL MANAGER—Under the 11 & 12 Vict. c. 45, and the 12 & 13 Vict. c. 108, the official manager to whom calls are ordered to be paid, does not, in virtue of such order, become a creditor of the person who has to pay the calls, so as to be entitled to be a petitioning creditor, and to ask for an adjudication in bankruptcy against him. *Williams* v. *Harding* 9

PARCEL OR NO PARCEL—Parcel or no parcel is a question of fact for the jury, but the Judge is bound to tell the jury what is the proper construction of any documents necessary to be considered in the decision of that question. *Lyle* v. *Richards* 222

In a "sett," or lease of a mine, the boundary line was thus described, "a line drawn from *J. V.'s* house," to a bound-stone; and in the description of the parcels in the lease, it was said, "which said premises are particularly described by the map on the back of this "sett." On this map the boundary line appeared to be drawn from the north-east corner of the house. The position of the house itself was incorrectly represented on the map:—

Held, that the Judge was bound to look to the map as forming part of the deed, and (*diss.* Lord *Westbury*) to tell the jury that the line was to be drawn as marked on the map. *Id.*

Per Lord *Westbury*:—In this case, it being ascertained that the house itself was incorrectly laid down in the map, it was impossible to know, by an examination of the deeds, or by their construction alone, from what corner of the house the boundary line was to be drawn; that consequently there was a latent ambiguity which was to be determined by evidence, and was not dependent on construction. *Id.*

PARTIES: *See* PRACTICE.

PASSENGER TRAFFIC DUTY—By the 2nd section of the 5 & 6 Vict. c. 79, a duty is imposed on sums of money received by railway companies in respect of passenger traffic; and by section 4 an account of such sums is to be kept by the persons "so receiving or charging the same," who are to pay the duty thereon:—

Held, that the persons who actually receive the money, without regard to the question for whose ultimate benefit such money is received, are the persons to keep the accounts and to pay the duties. *The Great Western Railway Company* v. *The Attorney-General*. 1

Where, therefore, the *Great Western Railway Company* had made a "loop-line," over which the *Midland Railway Company* had, by Act of Parliament, running powers, and such powers were exercised

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by the *Midland Company* through its servants, engines, and carriages, independently of all control by the *Great Western Company*, but the fares received at the stations on the loop-lines for passengers carried by the *Midland Company* were, in fact, received by the clerks of the *Great Western Company*, though they were so received for the benefit of the *Midland Company*:—

Held, that the *Great Western Company* was bound, as actually receiving the fares, to keep the accounts and to pay the duty. *The Great Western Railway Company* v. *The Attorney-General* 1

The 7 & 8 Vict. c. 85, requires cheap trains to be run on every line, under certain conditions, performance of the first condition being expressly subjected to approval by the Board of Trade. There were other conditions, one of which was that the cheap train fares should not exceed one penny per mile. The Board had power to dispense with any of the conditions except this one. The 9th section declared that "no tax shall be levied on the receipts from the conveyance of passengers at fares not exceeding one penny for each mile." Trains were run at those fares, but these trains had not received the approval of the Board of Trade:—

Held, that the duty was payable on these cheap trains. *Id.*

PATENT: *See* PRACTICE.

A patent for "improvements in the preparation of red and purple dyes," thus described the process: "I mix aniline with dry arsenic acid, and allow the mixture to stand for some time; *or* I accelerate the operation by heating it to, or near to, its boiling point, until it assumes a rich purple colour." It was proved (and not denied by the patentee) that it was necessary to apply heat in order to produce the colour; but evidence was given that a competent workman would apply heat:—

Held, however, that this description in the specification was bad, and the patent founded thereon was invalid. *Simpson* v. *Holliday* .. 315

PERSONALTY: *See* WILL, 7.

PETITIONING CREDITOR: *See* BANKRUPTCY; OFFICIAL MANAGER.

PLEADING IN EQUITY—When pleadings in Equity are so framed as to appear to rest the claim for relief solely on the ground of fraud, it is not open to the Plaintiff, if he fails in establishing the fraud, to pick out from the allegations in the bill facts which might, if not put forward as proofs of fraud, have warranted the Plaintiff in asking, and the Court in granting, relief. *Hickson* v. *Lombard* 324

It is the duty of the Judge to determine whether the two are so interwoven with each other, that, on the failure of the proof of fraud, it is impossible to treat the other facts as separate allegations, justifying a separate mode of dealing with them. *Id.*

PRACTICE—1. Where, upon the construction of a will, there was a doubt whether an intestacy might not be declared, and where the fund to be distributed had been paid into Court under the *Trustee Relief Act*, 10 & 11 Vict. c. 96, the House declined to proceed with the appeal in the absence of any one to represent the next of kin, and the appeal was ordered to stand over in order to enable the parties contesting the construction of the will to apply to the Court below on the subject. The case was then to be heard on a supplemental petition. *Trevillian* v. *Knight* 30

2. Upon an appeal against a decree the House can only look to the decree itself, and to what is stated and referred to in the decree, and not to any extrinsic matter. *Fernie* v. *Young* 63

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3. If, therefore, a decree is founded upon the finding of issues, however those issues were found, whether on a trial at law or on a trial in the Court of Chancery, with or without a jury, and the decree states the findings, but does not refer to the evidence, the House, on an appeal against that decree, cannot look at the evidence to see whether it afforded ground for the findings or the decree. *Fernie* v. *Young*. 63

4. In a case, therefore, where there had been an application to the Court of Chancery for an injunction to restrain the infringement of a patent, and a trial had taken place before a Vice-Chancellor without a jury, and His Honour had made certain findings, and in the decree on the hearing had made no reference to anything but the findings, the patent, the specification, and the answers, and there was an appeal against the decree alone, it was held that the House had no power to look into the evidence in order to satisfy itself whether the decree was or was not warranted by the evidence, but was bound to confine itself to the decree and to the matters referred to in it. *Id.*

5. On the application for the injunction a trial was, by the Lord Chancellor, ordered to take place by a jury before a Vice-Chancellor. On a consent between the parties the Vice-Chancellor substituted a trial before himself without a jury. This was *ultra vires* of the Vice-Chancellor; the change could only be competently effected by an order of the Lord Chancellor. *Id.*

6. *Quære*, whether when such a change is effected by the consent of parties an appeal will lie. *Id.*

7. The Vice-Chancellor fixed the same day for the trial of the questions of fact and for the hearing of the cause; *Semble*, this was an irregularity. *Id.*

8. In reality the questions of fact and the hearing of the cause did, by the consent of the parties, for the purposes of general convenience, take place at the same time, but the findings on the issues were entered on one day, and the decree, which was founded on them, appeared to be made on the hearing of the cause, and was dated some days afterwards. This mode of proceeding did not enable the parties, upon an appeal against the decree, to open the whole matter as upon a motion for a new trial, and no such motion having been made in the Court below, this House refused to treat the appeal as one which brought the evidence and findings under its notice for review. *Id.*

9. The principles and practice of Courts of equity under the *Chancery Amendment Act* of 1858, and the *Chancery Regulation Act* of 1862, stated and explained. *Id.*

10. Where relief is sought in the Court of Chancery, the title to which may be dependent on a legal right, the preliminary trial as to the legal right "shall" (under the Act of 1862) be decided by the Court itself. No issue, therefore, can be directed. *Id.*

11. If one party enrols a decree before the time for a new trial expires, the other party is not thereby prevented from moving for a new trial. *Id.*

12. Vice-Chancellor *Wood*, in the Court below, prefaced a decree with the words "the guardians of the two infants requiring the direction of the Court as to the application of the rents of the real estates," and then declared that on the death of *J. C. J.*, his two sons (one born before and the other after the death of the testator), took estates in tail male in remainder in the real estates, and that the younger was entitled to maintenance out of the income arising from the said estates; but made no declaration as to the legal rights of the two sons as joint tenants, or as tenants in common:—

Held, that the decree was right. *De Windt* v. *De Windt* 87

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13. The Court of Appeal in Chancery has not, under the 21 & 22 Vict. c. 27, power, on an application for a new trial, to reverse the findings of a Vice-Chancellor on issues of fact tried before him; but where the issues raise mixed questions of law and fact, if the decision of one of the questions discussed is sufficient to dispose of the case, the Court of Appeal may give a final judgment upon it, without ordering a new trial on the facts. *Simpson* v. *Holliday* 315

14. The 3rd section of the 21 & 22 Vict. c. 27, does not, by reference to proceedings at Common Law, impose limits upon the right of appeal previously existing against any order made in the Court of Chancery. Where, therefore, an order had been made in that Court by a Vice-Chancellor, on his own findings, upon a trial without a jury, and that order had been confirmed by the Lord Chancellor on appeal:—

Held, that the order of the Lord Chancellor was the subject of appeal to this House. *Curtis* v. *Platt* 337

PRESCRIPTION: *See* CANAL, 2, 3.

PRINCIPAL AND AGENT: *Quære*, whether an agent, having authority to let lands, can bind his principal by a stipulation that in certain events the tenant shall be entitled to have a lease upon certain terms. *Ramsden* v. *Dyson* 129

If a principal knows that a stranger is dealing with his agent under the belief that all statements made by the agent were warranted by the principal, and, so knowing, allows the stranger to expend money in that belief; *Semble*, that a Court of Equity would not afterwards allow the principal to set up want of authority in the agent. But this knowledge must be brought home to the principal. *Id.*

PRIVATE ACTS, CONSTRUCTION OF: *See* CANAL; COMPULSORY POWERS; CORPORATION.

PUBLIC TRUSTS: *See* CORPORATION; TRUSTS.

RAILWAYS AND RAILWAY ACTS: *See* CHEAP TRAINS; COMPULSORY POWERS; PASSENGER TRAFFIC DUTY.

REMOTENESS: *See* WILL, 7.

REVENUE: *See* LEGACY DUTY; PASSENGER TRAFFIC DUTY.

SALE OF LANDS: *See* COMPULSORY POWERS.

STATUTES.—3 & 4 Will. 4, c. 71 254
5 & 6 Vict. c. 79 1
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STIFLING A PROSECUTION: *See* FELONY.

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SUBSTITUTIONAL DEVISE: *See* WILL, 4.

SUPPLEMENTAL PETITION: *See* PRACTICE, 1.

TENANT IN TAIL: *See* WILL.

TRAFFIC DUTY: *See* PASSENGER TRAFFIC DUTY.

TRIAL IN CHANCERY, WITH OR WITHOUT A JURY: *See* PRACTICE.

TRUSTS AND TRUSTEES: *See* COMPULSORY POWERS; CORPORATION.
Trustees may render the property of their beneficiaries liable to third persons for acts done in the exercise of a trust. *Mersey Docks* v. *Gibbs*. *The Same* v. *Penhallow* 93

Per Lord *Westbury*:—Some of the observations of Lord *Cottenham*, in *Duncan* v. *Findlater* (6 Cl. & F. 894), commented on, and denied. *Id.*

UNDUE INFLUENCE: *See* FELONY.

USER: *See* CANAL, 2, 3.

WATER AND WATERCOURSE: *See* CANAL, 3.

WILL.—1. *G. B.*, by a holograph will made in 1849, gave "all my freehold property to *J. C. J.*, and after his death to his sons in tail lawfully begotten, and in the event of his or their death without sons lawfully begotten, then I leave the said estates to my cousin *J. H. H.*, and after his death, to his sons lawfully begotten, beginning with the elder:"—

Held, that the words "beginning with the elder" related only to the later of the two devises. *De Windt* v. *De Windt* 87

2. Vice-Chancellor *Wood*, in the Court below, prefaced his decree with the words "the guardians of the two infants requiring the direction of the Court as to the application of the rents of the real estates," and then declared that on the death of *J. C. J.* his two sons (one born before and the other after the death of the testator), took estates in tail male in remainder in the real estates, and that the younger was entitled to maintenance out of the income arising from the said estates; but made no declaration as to the legal rights of the two sons as joint tenants, or as tenants in common:—

Held, that the decree was right. *Id.*

3. A testator devised his estate and effects to trustees to pay the proceeds to his wife for life, and "after her decease, to distribute and divide the whole, &c., amongst such of my four nephews and two nieces" (naming them) "as shall be living at the time of her decease; but if any or either of them should then be dead, leaving issue, such issue shall be entitled to their father's or mother's share:"—

Held, that "issue" here meant children; and that the words, "should then be dead leaving issue," meant, "should before then have died leaving issue." *Martin* v. *Holgate* 175

4. Three of the nephews died in the lifetime of the testator's widow, two of them without ever having had a child, one of them leaving a daughter. This daughter, likewise, died before the widow:—

Held, that the gift to the children was original, not substitutional, and that this daughter, upon her father's death, took a vested interest in the share which, if he had survived, he would have taken. *Id.*

5. The fact that the gift to the parent was contingent did not affect

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the nature of the gift to the issue, which was an independent bequest. *Martin* v. *Holgate* 175

6. In *Ireland* any legacy given by a will for purposes merely charitable, is exempt from legacy duty; but to have the benefit of that exemption it must be given by the will itself, and not be devoted to charitable purposes by the means of any document distinct from the will, or on any private understanding. *Cullen* v. *The Attorney-General* 190

7. A testator devised his real and personal estates to trustees; he desired that his share in a banking business should be offered to his second nephew, and, in case of non-acceptance by him, to the brothers of that nephew, according to priority of birth. He directed his trustees to stand possessed of his estates for the use of the nephew so accepting for life, with remainder to the first and other sons of such accepting nephew in tail, and he bequeathed his personal property on the same trusts as were directed concerning his real estate, "or as near thereto as the rules of law and equity will permit:" he added a proviso that the personal estate should not vest absolutely in any tenant in tail unless such person should attain twenty-one. The nephew did accept, and died leaving a son, who became first tenant in tail by purchase of the real estates:—

Held, that, the bequest not being executory, the words "so near thereto as the rules of law and equity will permit," did not affect its construction. *Christie* v. *Gosling* 279

Held, also (*diss.* Lord *St. Leonards*), that the gift of the personalty was not one void for remoteness, as a gift to such tenant in tail who should live to attain twenty-one, but was a gift to tenants in tail by purchase only, and that the first person who bore the character of tenant in tail of the real estate by purchase, took an absolute interest in the personalty. *Id.*

There being a difference of opinion in the Courts below, and in this House, the doubts having been raised by ambiguity in the words of the testator, the costs were ordered to come out of the estate. *Id.*

WINDING-UP: *See* BANKRUPTCY.

WORDS—"As near as the rules of law and equity will permit." *Christie* v. *Gosling* 279

"Beginning with the elder." *De Windt* v. *De Windt* .. 87

"Debt." *Williams* v. *Harding* 9

"Issue." *Martin* v. *Holgate* 175

"Or." *Simpson* v. *Holliday* 315

"Then be dead." *Martin* v. *Holgate* 175

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